RECORD AND BRIEFS

No. 141, Original

FILED
FEB 13 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO and
STATE OF COLORADO,

Defendants.

On New Mexico's Motion To Dismiss Texas's Complaint And The United States' Complaint In Intervention And Motions Of Elephant Butte Irrigation District And El Paso County Water Improvement District No. 1 For Leave To Intervene

FIRST INTERIM REPORT OF THE SPECIAL MASTER

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February 9, 2017

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No. 141, Original

In The Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO and
STATE OF COLORADO,

Defendants.

On New Mexico's Motion To Dismiss Texas's Complaint And The United States' Complaint In Intervention And Motions Of Elephant Butte Irrigation District And El Paso County Water Improvement District No. 1 For Leave To Intervene

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FIRST INTERIM REPORT OF THE SPECIAL MASTER

This original jurisdiction action presents a question of construction of the Rio Grande Compact, a 1938 agreement among the States of Colorado, New Mexico, and Texas, approved by Congress in 1939, and purposed to "effect[] an equitable apportionment" of "the waters of the Rio Grande above Fort Quitman, Texas."

Act of May 31, 1939, ch. 155, 53 Stat. 785 [hereinafter 1938 Compact] (attached hereto as **Appendix A**). Although the negotiators of the 1938 Compact intended the compact "to remove all causes of present and future controversy among these States and between citizens of one of these States and citizens of another State with respect to the use of the waters of the Rio Grande," *id.* at 785, that lasting peace has not been achieved, as evidenced by the periodic litigation between signatory States since the compact's ratification. *See, e.g.*, *Texas v. New Mexico*, 342 U.S. 874 (1951); *Texas v. Colorado*, 389 U.S. 1000 (1967).

The United States Supreme Court granted leave to Texas in 2014 to file the instant Complaint, in which Texas claims that various actions of New Mexico deprive Texas of water to which it is entitled under the 1938 Compact. *See Texas v. New Mexico*, 134 S. Ct. 1050 (2014). In its Order granting Texas leave to file its Complaint, the Court also granted New Mexico sixty days within which to file a motion to dismiss the case. *See id.* With leave of the Court, *see Texas v. New Mexico*, 134 S. Ct. 1783 (2014), the United States filed a Complaint in Intervention to protect what it termed "distinctively federal interests" concerning the effect this dispute has on the Rio Grande Project, a federal reclamation project operated by the Bureau of Reclamation of the Department of the Interior on the Rio Grande between Elephant Butte Reservoir, located approximately 105 miles from the New Mexico-Texas border, and Fort Quitman, Texas. (A map of the Rio Grande Basin is attached hereto as **Appendix B**; a

map of the Rio Grande Project, as **Appendix C.**). On April 30, 2014, New Mexico filed its motion to dismiss both Texas's Complaint and the United States' Complaint in Intervention in the nature of a motion under Rule 12(b)(6) of the Federal Rules of Civil Procedure. After the parties submitted briefing on the motion to dismiss, the Court referred the motion to me for resolution. *See* 135 S. Ct. 474 (2014).

On December 3, 2014, Elephant Butte Irrigation District filed a motion to intervene as a party to these proceedings, and on April 22, 2015, El Paso County Water Improvement District No. 1 also filed a motion to intervene as a party to these proceedings. After the parties submitted responses to those motions, the Court referred those motions to me for resolution as well. *See* 136 S. Ct. 289 (2015); 135 S. Ct. 1914 (2015).

This First Interim Report of the Special Master addresses those three pretrial motions. As discussed in detail below, I recommend that this Court deny New Mexico's motion to dismiss Texas's Complaint, but grant New Mexico's motion to dismiss the United States' Complaint in Intervention to the extent it fails to state a claim under the 1938 Compact; rather, to the extent that the United States has stated plausible claims against New Mexico under federal reclamation law, I recommend that the Court extend its original, but not exclusive, jurisdiction pursuant to 28 U.S.C. § 1251(b)(2) and resolve the claims alleged in the Complaint in Intervention for purposes of judicial economy and due to the interstate and international nature of the Rio Grande Project. Finally, I recommend that the

Court deny the motions of the irrigation districts for leave to intervene.

If the Court accepts my recommendations, the next step in this case will be discovery. This is an appropriate time for the Court to examine and consider the issues that have arisen in the case to date. New Mexico's motion to dismiss presents major legal issues that are critical to the ultimate resolution of this matter; its outcome will immediately shape the scope of discovery moving forward and may encourage settlement discussions among the parties. Also important is the resolution of the motions of Elephant Butte Irrigation District and El Paso County Water Improvement District No. 1 requesting leave to intervene, as the resolution of those motions will assist the parties and the Special Master in establishing the scope and procedure of discovery.

I. Introduction

In its Complaint, Texas alleges that, under the Rio Grande Compact, New Mexico is obliged to deliver "specified amounts of Rio Grande water into Elephant Butte Reservoir" and that, once thus delivered, "that water is allocated and belongs to Rio Grande Project beneficiaries in southern New Mexico and Texas, based upon allocations derived from the Rio Grande Project authorization and relevant contractual arrangements." Compl., at 2. Texas further alleges that for these beneficiaries to receive the water, "it must be released from Rio Grande Project facilities and allowed

to flow unimpeded through Rio Grande Project lands in southern New Mexico, and then across the state line into Texas." *Id.* at 2-3.

Texas alleges that New Mexico, through the actions of its officers, agents, and political subdivisions, has allowed the diversion of surface water and pumping of groundwater within the boundaries of New Mexico that is hydrologically connected to the Rio Grande downstream of the Elephant Butte Reservoir, thereby diminishing the amount of water that is released by the Rio Grande Project into Texas by tens of thousands of acre-feet[1] in violation of the 1938 Compact. Texas seeks: (i) declaratory relief as to its rights to the waters of the Rio Grande pursuant to the 1938 Compact; (ii) an order compelling New Mexico to "deliver the waters of the Rio Grande in accordance with the provisions of the Rio Grande Compact and the Rio Grande Project Act" and enjoining New Mexico from interfering with or usurping the United States' authority to operate the Rio Grande Project; and (iii) an order awarding damages including pre- and post-judgment interest for injuries allegedly suffered by Texas as a result of New Mexico's actions. Compl., at 15-16.[2]

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[1] An acre-foot of water is enough to cover an acre of land with one foot of water. *See Kansas v. Nebraska*, 135 S. Ct. 1042, 1051 & n.2 (2015).

[2] Colorado is named as a defendant in Texas's Complaint because it is a signatory to the 1938 Compact, but Texas seeks no relief from Colorado. Compl. ¶ 5. Colorado filed limited responses to Texas's motion for leave to file its Complaint and to the United

Similarly, in its Complaint in Intervention, the United States alleges that "New Mexico has allowed the diversion of surface water and the pumping of groundwater that is hydrologically connected to the Rio Grande downstream of Elephant Butte Reservoir by water users who either do not have contracts with the Secretary [of the Interior] or are using water in excess of contractual amounts," in violation of federal reclamation law. Compl. in Intervention ¶ 13. The United States also alleges that New Mexico's diversions below Elephant Butte Reservoir negatively interfere with the United States' contractual obligations to deliver water to its consumers, including its obligation pursuant to the Convention of 1906 to deliver water to Mexico. *Id.* ¶¶ 14-15. The United States seeks declaratory and injunctive relief, asking the Court: (i) to declare that New Mexico, as a party to the 1938 Compact, may not permit parties not in privity with the Bureau of Reclamation, as well as Rio Grande Project beneficiaries in New Mexico, to intercept or interfere with delivery of water from the Rio Grande Project; and (ii) to enjoin New Mexico from permitting such interception and interference with Project water. *Id.* at 5.

New Mexico moves to dismiss Texas's Complaint and the United States' Complaint in Intervention for failure to state a claim upon which relief can be granted under the terms of the 1938 Compact. New Mexico asserts that Texas's claim that New Mexico has

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States' brief as amicus curiae, but filed no response to the United States' motion for leave to intervene.

"allowed and authorized Rio Grande Project water intended for use in Texas to be intercepted and used in New Mexico" fails to state a claim under the 1938 Compact because the compact does not require New Mexico to deliver or guarantee water deliveries to the New Mexico-Texas state line or "to prevent diversion of water after New Mexico has delivered it at Elephant Butte Reservoir." Mot. to Dismiss at 28 (quoting Compl. ¶ 4). Indeed, New Mexico argues that its *only* duty under the 1938 Compact is to deliver water to Elephant Butte Reservoir. *See id.* at 59 ("New Mexico's duty under the Compact is to deliver water to Elephant Butte Reservoir, and neither Texas nor the United States alleges that New Mexico breached that duty."); *id.* at 61 ("In sum, New Mexico's duty under the Compact is to deliver water to Elephant Butte."). New Mexico, therefore, argues that it has no duty under the 1938 Compact "to limit post-1938 development below Elephant Butte" within its boundaries. *Id.* at 45.

New Mexico further asserts that its own state law, not the 1938 Compact, governs the distribution of water released from Elephant Butte Reservoir within New Mexico state boundaries. *See* Reply Br. at 14-15 ("Texas' and the United States' reading of the Compact . . . transforms Article IV's requirement that New Mexico deliver water to Elephant Butte into a silent but sweeping relinquishment of New Mexico's sovereign authority to regulate the use of state waters in southern New Mexico and a complete disavowal of this Court's long-standing recognition of the primacy of state water law under Section 8 of the Reclamation

Act."). Therefore, in the event that the Supreme Court dismisses Texas's Complaint for failure to state a plausible claim under the 1938 Compact (thereby removing the basis for the Court's original jurisdiction over the matter pursuant to 28 U.S.C. § 1251(a)), New Mexico argues that the Court should decline to extend its jurisdiction under § 1251(b)(2) and refuse to hear the United States' Complaint in Intervention because more appropriate venues exist in which the United States may assert its Project claims against New Mexico. *See* Mot. to Dismiss at 63-64.

Assuming Texas's and the United States' allegations of water usurpation are true, with all inferences inuring to the plaintiffs' benefit for the purposes of considering a motion in the nature of a motion under Rule 12(b)(6), to determine whether Texas and the United States have each stated a plausible claim under the 1938 Compact requires me to interpret the plain text and structure of the 1938 Compact, as well as to consider the effect the 1938 Compact's equitable apportionment has upon all other state-law appropriations granted by New Mexico.

However, before presenting my analysis of and recommendations for each of the motions, I move to an explanation of the broader legal context in which this case and the motions arise. Indeed, the "meaning and scope" of the 1938 Compact "can be better understood when the [Compact] is set against its background." *Arizona v. California*, 373 U.S. 546, 552 (1963).

II. Background Principles of Water Law

A. The Doctrine of Prior Appropriation

The States of Colorado, New Mexico, and Texas, like other western arid and semi-arid states, adopted the prior-appropriation doctrine to govern water use within each state. *See* COLO. CONST. art. XVI, §§ 5-6 ("Priority of appropriation shall give the better right as between those using the water for the same purpose. . . ."); N.M. CONST. art. XVI, §§ 2-3 ("The unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the state. Priority of appropriation shall give the better right."); TEX. WATER CODE ANN. §§ 11.021, 11.022, 11.027 ("As between appropriators, the first in time is the first in right.").[3]

"In the humid half of the nation, the right to use water generally depended on the ownership of land adjoining a watercourse." DONALD J. PISANI, TO RECLAIM A DIVIDED WEST: WATER, LAW, AND PUBLIC POLICY 1848-1902, at 11 (1992) [hereinafter PISANI, RECLAIM A DIVIDED WEST]. As explained by Justice Joseph Story,

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[3] Because of its unique history and the circumstances surrounding its entrance into the Union, as well as its wide range of climates, Texas is actually a dual-doctrine state that recognizes both prior-appropriation and riparian doctrines of water use. *See generally City of Marshal v. City of Uncertain*, 206 S.W.3d 97, 101-03 (Tex. 2006) (describing evolution of Texas water law).

credited for introducing the doctrine of riparian rights to our legal system:

> Primâ facie every proprietor upon each bank of a river is entitled to the land, covered with water, in front of his bank, to the middle thread of the stream, or, as it is commonly expressed, usque ad filum acquae. In virtue of this ownership he has a right to the use of the water flowing over it in its natural current, without diminution or obstruction. But, strictly speaking, he has no property in the water itself; but a simple use of it, while it passes along. The consequence of this principle is, that no proprietor has a right to use the water to the prejudice of another. It is wholly immaterial, whether the party be a proprietor above or below, in the course of the river; the right being common to all the proprietors on the river, no one has a right to diminish the quantity which will, according to the natural current, flow to a proprietor below, or to throw it back upon a proprietor above. This is the necessary result of the perfect equality of right among all the proprietors of that, which is common to all. The natural stream, existing by the bounty of Providence for the benefit of the land through which it flows, is an incident annexed, by operation of law, to the land itself.

Tyler v. Wilkinson, 24 F. Cas. 472, 474 (C.C.D. R.I. 1827) (Story, J.). Justice Story may have recognized that *any* use by one proprietor would surely prejudice another, because he qualified those statements by introducing

the concept of "reasonable use" of the flow of the stream:

> When I speak of this common right, I do not mean to be understood, as holding the doctrine, that there can be no diminution whatsoever, and no obstruction or impediment whatsoever, by a riparian proprietor, in the use of the water as it flows; for that would be to deny any valuable use of it. There may be, and there must be allowed of that, which is common to all, a reasonable use. The true test of the principle and extent of the use is, whether it is to the injury of the other proprietors or not. There may be a diminution in quantity, or a retardation or acceleration of the natural current indispensable for the general and valuable use of the water, perfectly consistent with the existence of the common right. The diminution, retardation, or acceleration, not positively and sensibly injurious by diminishing the value of the common right, is an implied element in the right of using the stream at all.

Id.

As western arid and semi-arid territories joined the United States in the mid-nineteenth century, those lands became part of the public domain of the United States.[4] "In theory, the ownership of the public domain

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[4] The ratification of the 1848 peace treaty between the United States and Mexico that ended the Mexican-American War, commonly known as the Treaty of Guadalupe Hidalgo, redrew Mexico's northern border, required the United States to pay $15

in the West by the federal government prevented states from rejecting the common law of riparian rights and adopting a theory of water rights separate from land ownership," one that would recognize water uses that are prior in time as prior in right. A. DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES § 5.1 (2011). But "[t]he California mining industry, and specifically its enormous need for capital, transformed water into a species of private property." PISANI, RECLAIM A DIVIDED WEST, at 12. The doctrine of prior appropriation evolved in the mining industry in California and other western arid States as a grassroots method to allocate rights in the absence of the federal government's

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million to Mexico and to discharge claims against Mexico belonging to United States citizens in exchange for the lands west of the Rio Grande comprising parts of what are today New Mexico, Arizona, Nevada, Utah, Wyoming, Colorado, and California. *See* Treaty of Peace, Friendship, Limits, and Settlement With the Republic of Mexico, U.S.-Mex., art. V, Feb. 2, 1848, 9 Stat. 922, 926. Although Congress admitted Texas as a constituent State of the Union in 1845, Texas's current boundaries were not finalized until the Compromise of 1850, a package of separate bills passing in September 1850, pursuant to which, in pertinent part, California entered the Union, Utah became a Territory, and the Republic of Texas ceded its claims to lands east of the Rio Grande to the United States, including parts of present-day New Mexico, Colorado, Kansas, Oklahoma, and Wyoming, in exchange for $10 million of the Republic's debt. *See* Act of Sept. 9, 1850, ch. XLIX, 9 Stat. 446; Act of Sept. 9, 1850, ch. L, 9 Stat. 452; Act of Sept. 9, 1850, ch. LI, 9 Stat. 453. And in 1853, the United States acquired title to the lands south of the Gila River, comprising what is today southern Arizona and New Mexico, for $10 million through the Gadsden Purchase Treaty. *See* Treaty With Mexico Dec. 30, 1853, U.S.-Mex., *amended and ratified* June 30, 1854, 10 Stat. 1031.

assertion of its own right to control the use of the public domain. So, although the California legislature in 1850 adopted the common law as "the rule of decision in all the Courts of this State," which would have meant the application of the riparian doctrine to decide issues of water rights, 1850 Cal. Stat. 219 (codified as amended at CAL. CIV. CODE § 22.2), in 1855, the Supreme Court of California applied the doctrine of prior appropriation as it had evolved in practice to decide the rights of two miners who had each diverted the same stream, *see Irwin v. Phillips*, 5 Cal. 140 (1855).

The *Irwin* court began with the premise that "the lands are the property either of the State or of the United States," but observed that

> [n]o right or intent of disposition of these lands has been shown either by the United States or the State governments, and with the exception of certain State regulations, very limited in their character, a system has been permitted to grow up by the voluntary action and assent of the population, whose free and unrestrained occupation of the mineral region has been tacitly assented to by the one government, and heartily encouraged by the expressed legislative policy of the other.

Id. at 145-46. The court concluded that both miners' rights were junior to the government as the true owner of the land, but

> that however much the policy of the State, as indicated by her legislation, has conferred the privilege to work the mines, it has equally

> conferred the right to divert the streams from their natural channels, and as these two rights stand upon an equal footing, when they conflict, they must be decided by the fact of priority upon the maxim of equity, *qui prior est in tempore potior est injure* [sic].

Id. at 147. The Supreme Court of California in later decisions continued to refine the doctrine of prior appropriation to include the requirements of actual and continual appropriation for a beneficial use before rights could vest. *See Kelly v. Natoma Water Co.*, 6 Cal. 105, 108 (1856) ("Possession, or actual appropriation, must be the test of priority in all claims to the use of water, whenever such claims are not dependent upon the ownership of the land through which the water flows."); *Maeris v. Bicknell*, 7 Cal. 261, 263 (1857) (requiring "an actual appropriation, or intention to appropriate, followed by due diligence" in order to "gain[] a priority over . . . all persons holding under them"); *Thompson v. Lee*, 8 Cal. 275, 280 (1857) (holding that water rights vest from date of notice of appropriation, as long as appropriator followed through with actual use of water for a beneficial use).

The rationales underlying the evolution and spread of the doctrine of prior appropriation throughout the western arid States were explained in 1903 by Elwood Mead, a former State Engineer of Wyoming who would later serve as the head of irrigation investigations for the U.S. Department of Agriculture and Chairman of Reclamation under President Calvin Coolidge:

As many ditches were built about the same time, it became necessary to prescribe rules for determining when the right should attach. If the right should date from the time of actual use of the water, a premium would be placed upon poor construction, and it might happen that during the construction of a large canal smaller canals or those more easily built might be begun and completed and appropriate all the water, leaving the large canal a total loss to its builders. To avoid this the doctrine of relation has been adopted; that is, the right does not date from the time the water is used but relates back to the time of the beginning of the work. To prevent an abuse, this doctrine has been modified by the provision that the work of construction must be carried on with due diligence. Under the doctrine of relation, a water right is initiated when the work of construction begins, and dates from that time, but is not perfected until the water has been actually diverted and used. The question of what is due diligence is a question of fact to be determined in each particular case, and when such diligence is not used, the right dates from the time of use.

. . . .

As scarcity of water led to the adoption of the doctrine of priority, the two led to the necessity of defining the quantity of water to which an appropriator should be entitled. While the early appropriators were entitled to protection in their use of water, the later comers had an equal claim to protection from an

> enlargement of those uses. The first appropriator had the first right, but he had not the right to take all the water he might want at any future time. His right must, in justice to others, be defined as to quantity as well as to time. In theory, beneficial use has been made the measure of a right. That is, each appropriator has a right as against a subsequent appropriator to a continued use of whatever quantity of water he had put to a beneficial use at the time of the acquirement of the subsequent right. What constitutes beneficial use, and the determination of the quantity of water so used, has been left to the courts in most States, and their decisions on these points have been the cause of a large part of the controversies over water rights. This, however, is not a fault of the theory, but of its application.

ELWOOD MEAD, IRRIGATION INSTITUTIONS: A DISCUSSION OF THE ECONOMIC AND LEGAL QUESTIONS CREATED BY THE GROWTH OF IRRIGATED AGRICULTURE IN THE WEST 65-67 (1903) [hereinafter MEAD, IRRIGATION INSTITUTIONS], http://catalog.hathitrust.org/Record/010464135.

"Th[e] general policy [of prior appropriation] was approved by the silent acquiescence of the federal government, until it received formal confirmation at the hands of Congress by the Act of [July 26,] 1866, [ch. 262, § 9, 14 Stat. 251, 253 (codified as amended at 30 U.S.C. § 51 and 43 U.S.C. § 661)]." *Cal. Or. Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 154 (1935). "This provision was 'rather a voluntary recognition of

a pre-existing right of possession, constituting a valid claim to its continued use, than the establishment of a new one.'" *Id.* at 155 (quoting *Broder v. Natoma Water & Mining Co.*, 101 U.S. 274, 276 (1879)). "And in order to make it clear that the grantees of the United States would take their lands charged with the existing servitude," *id.*, the Act of July 9, 1870, amended the Act of 1866 to reflect that "[a]ll patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under [the Act of 1866]," ch. 235, § 17, 16 Stat. 217, 218 (codified as amended at 30 U.S.C. § 52 and 43 U.S.C. § 661).

As explained by the Supreme Court, Congress understood that, to encourage settlement and reclamation of the arid Western States, "an enforcement of the common-law rule, by greatly retarding if not forbidding the diversion of waters from their accustomed channels, would disastrously affect the policy of dividing the public domain into small holdings and effecting their distribution among innumerable settlers." *Cal. Or. Power Co.*, 295 U.S. at 157. Indeed,

> it had become evident to Congress, as it had to the inhabitants, that the future growth and well-being of the entire region depended upon a complete adherence to the rule of appropriation for a beneficial use as the exclusive criterion of the right to the use of water. The streams and other sources of supply from which this water must come was separated

> from one another by wide stretches of parched and barren land which never could be made to produce agricultural crops except by the transmission of water for long distances and its entire consumption in the processes of irrigation. Necessarily, that involved the complete subordination of the common-law doctrine of riparian rights to that appropriation. . . .
>
> In the light of the foregoing considerations, the Desert Land Act [of 1877] was passed. . . . By its terms, not only all surplus water over and above such as might be appropriated and used by the desert land entrymen, but 'the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable' were to remain 'free for the appropriation and use of the public for irrigation, mining and manufacturing purposes.' If this language is to be given its natural meaning, and we see no reason why it should not, it effected a severance of all waters upon the public domain, not theretofore appropriated, from the land itself. From that premise, it follows that a patent issued thereafter for lands in a desert land state or territory, under any of the land laws of the United States, carried with it, of its own force, no common-law right to the water flowing through or bordering upon the lands conveyed.

Id. at 157-58 (quoting Act of Mar. 3, 1877, ch. 107, 19 Stat. 377 (codified as amended at 43 U.S.C. § 321)). In sum,

> [u]nder [the prior-appropriation] doctrine the first person who acts toward the diversion of water from a natural stream and the application of such water to a beneficial use has the first right, provided he diligently continues his enterprise to completion and beneficially applies the water. The rights of subsequent appropriations are subject to rights already held in the stream.

Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 98 (1938); *see also Arizona v. California*, 373 U.S. 546, 555 (1963) ("Under [the prior appropriation doctrine], the one who first appropriates water and puts it to beneficial use thereby acquires a vested right to continue to divert and use that quantity of water against all claimants junior to him in point of time. 'First in time, first in right' is the short hand expression of this legal principle.").

But as the prior appropriation doctrine permeated throughout the western arid States, not everyone believed the doctrine of prior appropriation to be a panacea for establishing water use rights or resolving subsequent disputes. As an example, prior to Congress's passage of the Desert Land Act of 1877, which abrogated common law riparian rights on federal public lands to make way for the doctrine of prior appropriation to determine water use rights, Chief Justice Decius Wade of the Montana Supreme Court cautioned against the consequences of wholesale adoption of the doctrine of prior appropriation:

Now, if the doctrine of prior appropriation is to prevail, this consequence must inevitably result: A few men will locate their farms near the mouth of a stream and appropriate the waters thereof, and any subsequent locators up the stream would be guilty of a trespass if they undertook to use any of the waters thereof, and an action could be prosecuted and maintained against them. The result is, that thousands of acres in our valleys must remain barren deserts, while, with an equal and just distribution of water, all might be cultivated. Thus the prior appropriator renders vast tracts of land utterly worthless, and their sale is lost to the government and their cultivation to the people. Such a doctrine is against public policy and cripples the life of the industries of the Territory.

. . . .

It is well known to any individual who has resided in this Territory for one season, that there is not sufficient available water in the Territory for the purposes of irrigation, and if the doctrine of prior appropriation . . . is to prevail, long before one-tenth part of the tillable land in the Territory is subjected to cultivation the entire available water of the country will have been monopolized and owned by a few individuals, thereby defeating any advance in the agricultural prosperity of the country, and thereby directly repelling immigration thither. . . .

. . . .

> What says the government of the United States to the doctrine that renders the public domain of Montana utterly of no value? The doctrine of prior appropriation robs the general government of its property, by making the government lands of no value. And all these consequences, so disastrous in any view, are to be visited upon Montana, that a few individuals may have what does not now, and never did, belong to them.

Thorp v. Freed, 1 Mont. 651, 677-78, 686-87 (1872) (Wade, C.J., concurring).

Elwood Mead also documented serious systemic flaws in the application of the doctrine of appropriation, identifying inefficiencies, fraud, and confusion in the noticing, recording, and perfecting of water rights claims. *See* MEAD, IRRIGATION INSTITUTIONS, at 67-81.[5]

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[5] As described by Mead:

> A land system which would permit of a score of filings on the same quarter-section, and then leave the claimants to fight for its possession, would not be held in high esteem. The law for recording appropriations of water which places no restrictions on the number or volume of these claims is just as illogical, and is fraught with more serious evil. To say the least, these records are of little value. The clerk or the recorder has to write down whatever is submitted. He has no means of knowing whether a new claim is in accordance with facts, whether a projected work will be carried out, or if it will be a public benefit. No means is provided for ascertaining if the claims recorded have been followed by construction. No provision is made for measuring the flow of streams, in order to know if the amount appropriated is equal to or in excess of the supply. The law says that

He advocated for an administrative permit system to regulate the acquisition, priority, transfer, and termination of water use rights:

> As the demands upon the water-supply have grown, necessity has led to a gradual decrease in the freedom of the appropriator and an increase in the control exercised by the public authorities. . . . The person wishing to use water must secure a permit from a board of State officials, and the right acquired is not governed by the appropriator's claim, but by the license for the diversion issued by the State authorities. This tendency toward public supervision is manifest in the other arid States, and it seems only a question of time

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> the appropriation must be made for a useful or beneficial purpose, but it goes no farther. It provides no methods by which the public may ascertain promptly and inexpensively whether the amount taken out is the amount to which claim was laid, whether it has been applied beneficially or not applied at all. If the claimant proceeds diligently and uninterruptedly with construction and uses the water as described in his notice, he is entitled to the right thereby acquired, and it should be protected without cost to him. On the other hand, if a claim is not completed in accordance with statements of the notice, if the water claimed is not all used or not used in the manner specified, it is equally important that the records show these facts. Unfortunately, the completion of appropriations in accordance with the statements of claims is the exception rather than the rule, in which case the recorded notices are false and misleading and in time acquire a force and standing to which they are not entitled.

MEAD, IRRIGATION INSTITUTIONS, at 78-79.

> when the doctrine of appropriation will give way to complete public supervision.

Id. at 82.

Mead's ideas for using administrative permit systems to regulate water use rights and priorities within each arid state gained traction, resulting in the eventual implementation in many arid states of an administrative permit system to regulate surface water use rights within the boundaries of each state. *See, e.g.*, N.M. CODE R. § 19.26.2; 30 TEX. ADMIN. CODE §§ 295.1-.202, 297.1-.108.

B. The Doctrine of Equitable Apportionment

The preamble of the Rio Grande Compact declares that it was entered into by the signatory states in order to achieve "an equitable apportionment" of the waters of the Rio Grande above Fort Quitman, Texas, that is to say, waters flowing in an interstate stream. *See* 1938 Compact, 53 Stat. 785.

The state-law doctrine of prior appropriation governs intrastate water rights and disputes in western arid States; but an interstate stream used beneficially in each State through which it passes is considered to be "more than an amenity, [but rather] a treasure [that] offers a necessity of life that must be rationed among those who have power over it." *New Jersey v. New York*, 283 U.S. 336, 342 (1931); *see also Wyoming v. Colorado*, 259 U.S. 419, 466 (1922). Indeed, all States

through which an interstate stream flows "have real and substantial interests in the River that must be reconciled as best they may." *New Jersey*, 283 U.S. at 342-43. The Harmon Doctrine – that opinion advanced by U.S. Attorney General Judson Harmon in 1895 in response to Mexico's claims pertaining to the usurpation of Rio Grande waters by United States citizens that essentially would allow a sovereign country to dispose of its resources within its own boundaries regardless of the consequences of that action in a neighboring sovereign country – was practically rejected at the time by the U.S. Secretary of State, resulting in the Convention of 1906 between the United States and Mexico apportioning Rio Grande water to Mexico. *See* discussion *infra* Parts III.B.3.-4. & III.C.4. And its application to interstate stream conflicts between quasi-sovereigns was likewise rejected by the Supreme Court first in *Kansas v. Colorado*, 206 U.S. 46, 97 (1907), and has since been consistently rejected. *See Wyoming*, 259 U.S. at 466 ("The contention of Colorado that she as a state rightfully may divert and use, as she may choose, the waters flowing within her boundaries in this interstate stream, regardless of any prejudice that this may work to others having rights in the stream below her boundary, cannot be maintained. The river throughout its course in both states is but a single stream, wherein each state has an interest which should be respected by the other. A like contention was set up by Colorado in her answer in *Kansas v. Colorado* and was adjudged untenable. Further consideration satisfies us that the ruling was right."); *see also New Jersey*, 283 U.S. at 342-43.

Equitable apportionment, then, as it has evolved through *Kansas v. Colorado* and its progeny, "is the doctrine of federal common law that governs disputes between states concerning their rights to use the water of an interstate stream." *Colorado v. New Mexico*, 459 U.S. 176, 183 (1982) (citing *Kansas*, 206 U.S. at 98; *Connecticut v. Massachusetts*, 282 U.S. 660, 670-71 (1931)). Equitable apportionment of the waters of interstate streams, or other natural resources,[6] may be accomplished in one of two ways: (i) judicially, by the Supreme Court of the United States, *see, e.g.*, *Kansas*, 206

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[6] The Supreme Court has also applied the equitable apportionment doctrine to apportion interstate natural resources other than water. *See, e.g.*, *Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017, 1025 (1983) (applying the doctrine to equitably apportion anadromous fish traveling through multiple states). As explained by the Court:

> The doctrine of equitable apportionment is neither dependent on nor bound by existing legal rights to the resource being apportioned. The fact that no State has a pre-existing legal right of ownership in the fish does not prevent an equitable apportionment. Conversely, although existing legal entitlements are important factors in formulating an equitable decree, such legal rights must give way in some circumstances to broader equitable considerations. . . .
>
> At the root of the doctrine is the same principle that animates many of the Court's Commerce Clause cases: a State may not preserve solely for its own inhabitants natural resources located within its borders. Consistent with this principle, States have an affirmative duty under the doctrine of equitable apportionment to take reasonable steps to conserve and even to augment the natural resources within their borders for the benefit of other States. . . .

Id. (internal citations omitted).

U.S. at 97-98;[7] or (ii) legislatively, by interstate compact or other congressional act, *see, e.g.*, *Colorado v. Kansas*, 320 U.S. 383, 392 (1943) ("Such controversies may

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[7] In *Hinderlider v. LaPlata River & Cherry Creek Ditch Co.*, the Supreme Court commented on its own jurisdiction to equitably apportion interstate streams and decide controversies emanating therefrom:

> For whether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive. Jurisdiction over controversies concerning rights in interstate streams is not different from those concerning boundaries. These have been recognized as presenting federal questions.

304 U.S. 92, 110 (1938) (internal citations omitted). In 1945, the Supreme Court formulated the standard for equitable apportionment that remains intact today, one which does not necessarily require strict adherence to the doctrine of prior appropriation:

> [I]f an allocation between two appropriation States is to be just and equitable, strict adherence to the priority rule may not be possible. . . . So far as possible those established uses should be protected though strict application of the priority rule might jeopardize them. Apportionment calls for the exercise of an informed judgment on a consideration of many factors. Priority of appropriation is the guiding principle. But physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former – these are all relevant factors.

Nebraska v. Wyoming, 325 U.S. 589, 618 (1945).

appropriately be composed by negotiation and agreement, pursuant to the compact clause of the Federal constitution."); *Arizona v. California*, 373 U.S. 546, 557-65 (1963) (describing Congress's specific apportionment of water to three States via the Boulder Canyon Project Act). As explained by the Supreme Court regarding the latter:

> The compact – the legislative means – adapts to our Union of sovereign States the age-old treaty making power of independent sovereign nations. Adjustment by compact without a judicial or quasi-judicial determination of existing rights had been practiced in the Colonies, was practiced by the States before the adoption of the Constitution, and had been extensively practiced in the United States for nearly half a century before this Court first applied the judicial means in settling the boundary dispute in *Rhode Island v. Massachusetts*, 12 Pet. 657, 723-725, 9 L. Ed. 1233.

Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 104 (1938) (internal footnotes and citations omitted).

But in equitably apportioning via compact, the States do so "in the shadow of [the Supreme Court's] equitable apportionment power – that is, [the Court's] capacity to prevent one State from taking advantage of another." *Kansas v. Nebraska*, 135 S. Ct. 1042, 1052 (2015). "Each State's 'right to invoke the original jurisdiction of th[e] Court [is] an important part of the context' in which any compact is made." *Id.* (quoting *Texas*

v. New Mexico, 462 U.S. 554, 569 (1983)). "And it is 'difficult to conceive' that a downstream State 'would trade away its right' to [the Court's] equitable apportionment if, under such an agreement, an upstream State could avoid its obligations or otherwise continue overreaching." *Id.* (quoting *Texas*, 462 U.S. at 569).

As quasi-sovereigns, States entering a compact to equitably apportion an interstate stream have the power to allocate the water among the signatory States in any way they see fit in order "[t]o secure the greatest beneficial use of the water in the stream." *Hinderlider*, 304 U.S. at 108 (internal quotations omitted). For example, in 1922, seven States entered into a compact equitably apportioning the Colorado River and its tributaries between two regions, with each region receiving 7.5 million acre-feet: the Upper Basin, comprising parts of Arizona, Colorado, New Mexico, Utah, and Wyoming; and the Lower Basin, comprising parts of Arizona, California, Nevada, New Mexico, and Utah. *See* Colorado River Compact of 1922, http://www.usbr.gov/lc/region/g1000/lawofrvr.html (last visited Jan. 6, 2017).[8] In 1925, the States of Colorado and New Mexico

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[8] But the States within each Basin could not immediately agree upon each State's share of the water. Therefore, in 1928, "Congress in passing the [Boulder Canyon] Project Act intended to and did create its own comprehensive scheme for the apportionment among California, Arizona, and Nevada of the Lower Basin's share of the mainstream waters of the Colorado River, leaving each State its tributaries." *Arizona v. California*, 373 U.S. 546, 565 (1963) (describing Act of Dec. 21, 1928, ch. 42, 45 Stat. 1057, 1059). Accepting the volumes apportioned by Reclamation (as operator and administrator of the Boulder Canyon Project) through contracts with water users in each of the three States,

equitably apportioned the La Plata River, allowing unrestricted usage by each State for approximately two months of each year and also for the other months of the year, if the mean flow is above 100 cubic feet per second at the state-line gauging station; otherwise, Colorado is required to deliver half of the mean flow below 100 cubic feet per second, and, at all times, the State Engineers have the discretion to rotate the waters when the flow is very low to secure the "greatest beneficial use" of the river. Act of Jan. 29, 1925, ch. 110, 43 Stat. 796, 797. As a last example, in 1951, Montana, Wyoming, and North Dakota allocated the Yellowstone River and its tributaries first by protecting appropriative rights existing as of January 1, 1950, and then by allocating fixed percentages of the remaining unappropriated water of each tributary to each State through which the tributary flows. Act of Oct. 30, 1951, ch. 629, 65 Stat. 663, 666-67.

Because an equitable apportionment by compact represents the work and will of quasi-sovereign States

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Congress apportioned 4.4 million acre-feet of water to California, 2.8 million acre-feet of water to Arizona, and 300,000 acre-feet of water to Nevada, with Arizona and California splitting any surplus. *Id.* at 560-65. In the Act, Congress left open the option for the Lower Basin States to agree upon different terms of apportionment via compact, which would have also required congressional approval, but they never chose that option. *Id.* at 562, 579.

Much later, in 1949, the States of the Upper Basin apportioned by compact to each State a percentage of water of the Colorado River allocated to the Upper Basin. *See* Act of Apr. 6, 1949, ch. 48, 63 Stat. 31.

who each hold title to equitable portions of an interstate stream, the Supreme Court has held that such an apportionment "is binding upon the citizens of each State and all water claimants, even where the State had granted the water rights before it entered into the compact." *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106 (1938).[9] But because each State's share of an interstate stream is limited to an equitable portion thereof, it necessarily follows that the maximum right to appropriate interstate waters that each State could ever confer upon its own citizens cannot exceed that State's equitable share of the stream. *See id.* at 102. As the Colorado high court deduced, it follows that "[e]quitable apportionment, a federal doctrine, can determine times of delivery and

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[9] In so holding, the *Hinderlider* court relied on its reasoning in *Wyoming v. Colorado*:

> But it is said that water claims . . . could not be, and were not, affected by the decree [of equitable apportionment], because the claimants were not parties to the suit or represented therein. In this the nature of the suit is misconceived. It was one between states, each acting as a quasi sovereign and representative of the interests and rights of her people in a controversy with the other. Counsel for Colorado insisted in their brief in that suit that the controversy was 'not between private parties' but 'between the two sovereignties of Wyoming and Colorado'; and this court in its opinion assented to that view, but observed that the controversy was one of immediate and deep concern to both states and that the interests of each were indissolubly linked with those of her appropriators.

Id. at 107 (quoting *Wyoming v. Colorado*, 286 U.S. 494, 508 (1932)).

sources of supply to satisfy that delivery without conflicting with state law, for state law applies only to the water which has not been committed to other states by the equitable apportionment." *Alamosa-La Jara Water Users Protection Ass'n v. Gould (In re Rules & Regulations Governing the Use, Control, and Protection of Water Rights for Both Surface and Underground Water Located in the Rio Grande and Conejos River Basins and Their Tributaries)*, 674 P.2d 914, 922 (Colo. 1983) (en banc), *as modified on denial of rehr'g* (Colo. 1984) (citing *Hinderlider*, 304 U.S. at 106-08).

III. The Historical Context: Events Leading to the Ratification of the 1938 Compact

Whatever their many other differences may be, counsel for the principal adversaries, Texas and New Mexico, appear to agree upon one proposition: namely, that "this compact and how it works and the facts in this case . . . [are] complex. This is a complex system." Hr'g Tr. 71:11-14, Aug. 19, 2015 (SM R. Doc. 37) (statements of counsel for Texas).[10] Similarly, counsel for New Mexico remarked: "[T]his case is much more complex than the *Montana* [*v. Wyoming & North Dakota*, Original 137] case was. . . . People have been fighting over this river for about 400 years and there's a lot of information to be imparted." Hr'g Tr. 20:24-25, 21:3-4, Apr. 23, 2015 (SM R. Doc. 34).

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[10] Citations to the record maintained by the Special Master at http://www.gordonarata.com are designated with the prefix "SM R. Doc."

In their briefs, the parties have recounted the history and current operations of the Rio Grande Project and the history of the Rio Grande Compact. *See, e.g.*, Mot. to Dismiss at 3-14; Texas' Opp. Mot. to Dismiss, at 4-6 (incorporating by reference the history presented in Texas' Brief in Supp. of Mot. for Leave, at 5-18), 41-54; United States' Opp. Mot. to Dismiss, at 4-13. Therefore, in Section III below, I review the historical context of this dispute, with my analysis of and recommendations for each of the motions following in Sections IV-VII. As noted above, the "meaning and scope" of the 1938 Compact "can be better understood when the [Compact] is set against its background." *Arizona v. California*, 373 U.S. 546, 552 (1963).

All the same, in analyzing New Mexico's Motion to Dismiss in Section IV, I conclude that the text and structure of the 1938 Compact unambiguously protect the administration of the Rio Grande Project as the sole method by which Texas receives all and New Mexico receives part of their equitable apportionments of the Rio Grande.

A. The Geography of the Upper Rio Grande Basin

The Rio Grande is an 1800-mile interstate and international stream, rising in Colorado, winding southward approximately 400 miles across New Mexico, and crossing into Texas, where it forms the 1250-mile international boundary between the United States and Mexico. *See* NAT'L RES. COMM., REGIONAL PLANNING:

PART VI-THE RIO GRANDE JOINT INVESTIGATION IN THE UPPER RIO GRANDE BASIN IN COLORADO, NEW MEXICO, AND TEXAS 1936-37, AT 7 (1938) [HEREINAFTER RIO GRANDE JOINT INVESTIGATION]. "So far as [the Rio Grande's] history is known it has always been a torrential or storm-water stream, subject at times to great floods and at other times to periods of minimum flow, when its bed was dry or carried an insignificant amount of water along certain parts of its course." U.S. DEP'T OF THE INTERIOR, UNITED STATES GEOLOGICAL SURVEY, THIRD ANNUAL REPORT OF THE RECLAMATION SERVICE 194, H.R. Doc. No. 58-28, at 395 (3d Sess. 1905) [hereinafter 1903-04 THIRD ANNUAL REPORT OF THE RECLAMATION SERVICE]. "The country through which it flows is very fertile, but the rainfall is so meager and so erratic that it is an arid desert and no crops can be raised without artificial irrigation." *Id.*

"With respect to usage of water and the problems concerned with that usage, the river is divided into two distinct sections at Fort Quitman, or at the narrow gorge a few miles below." RIO GRANDE JOINT INVESTIGATION, at 7. The Upper Rio Grande Basin (the area above Fort Quitman, Texas) is comprised of "parts of Colorado and New Mexico, and a very small part of Texas," with "more than 99 percent of the water supply com[ing] from Colorado and New Mexico in about equal amounts." *Id.* "Below, in the lower basin, the river develops its flow mainly from tributaries in Mexico." *Id.* The Upper Rio Grande Basin is naturally divided into three sections: (1) the San Luis section in Colorado, (2) the Middle section in New Mexico, and (3)

the Elephant Butte-Fort Quitman section in New Mexico, Texas, and Mexico. *See id.* This case centers primarily upon events concerning and occurring in the Elephant Butte-Fort Quitman section of the Upper Rio Grande Basin.

B. The Natural Behavior of the Rio Grande Lends Itself to Boundary and Resource Disputes

1. The Treaty of Guadalupe Hildago creates the International Boundary Commission to handle boundary disputes

The Treaty of Guadalupe Hidalgo, the peace treaty between the United States and Mexico that ended the Mexican-American War, granted to the United States lands west of the Rio Grande comprising parts of what are now New Mexico, Arizona, Nevada, Utah, Wyoming, Colorado, California, and Arizona. *See* Treaty of Peace, Friendship, Limits, and Settlement With the Republic of Mexico, U.S.-Mex., art. V, Feb. 2, 1848, 9 Stat. 922, 926 [hereinafter 1848 Treaty of Guadalupe Hidalgo]. The treaty created and charged the International Boundary Commission

> to designate the [international] boundary line with due precision, upon authoritative maps, and to establish upon the ground landmarks which shall show the limits of both republics, as described in the present article, the two governments shall each appoint a commissioner and a surveyor, who, before the

> expiration of one year from the date of the exchange of ratifications of this treaty, shall meet at the port of San Diego, and proceed to run and mark the said boundary in its whole course to the mouth of the Rio Bravo del Norte.

Id. at 927. Article XXI of that treaty provided that future disagreements between the countries "should be settled by the arbitration of commissioners appointed on each side, or by that of a friendly nation." *Id.* at 939.

When issues or disagreements regarding the international boundary arose, subsequent conventions between the two countries reconvened the International Boundary Commission and assigned resolution of those disagreements to that commission pursuant to Article XXI of the 1848 Treaty of Guadalupe Hidalgo. For example, a convention ratified in the mid-1880s required the Commission to deal with a specific problem caused, in large part, by the behavior of the Rio Grande. As explained in 1914 by General Anson Mills, then-Commissioner of the International Boundary Commission, to the House of Representatives Committee on Foreign Affairs:

> The Rio Grande is a torrential stream. In our 20 years' investigation we have found no other like it in the world. There are changes in the river brought about by condition that we have found in no other river. In times of flood the river carries, throughout its length, a great deal of water, but frequently it goes dry, sometimes for 200 miles, and in one year there was no water passed for eight months.

> The cause of the organization of this commission was that these changes brought about islands and separate pieces of land, the jurisdiction of which was unknown to either country, and they were a refuge for smugglers, horse thieves, and other criminals, wherein neither country could find the jurisdiction to try them. This created a great deal of trouble for the last 50 years, but the climax came in 1892 when one of the islands or bancos, as they are now called, namely, Banco de Vela, became a subject of contention between the citizens of each side of the river.
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> . . . .
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> Each country provoked the other until the Mexicans arrested three Americans on the island by their officers, carried them across and imprisoned them in jails, and the Americans arrested several Mexicans whom they found on the islands and confined them in jail. Each country appealed to its State Department, and through the War Department, I being in command of the Third Cavalry on the American side of the river, we ordered and placed troops to prevent collision, and the Mexican Fourth Cavalry was likewise by the Mexican Government ordered to align a number of their men on the Mexican si[illegible]

International (Water) Boundary Commission, United States and Mexico: Hearing Before the H. Comm. on Foreign Affairs, 63d Cong. 3-4 (1914) (statement of Gen. Anson Mills), http://babel.hathitrust.org/cgi/pt?id=

chi.45145611;view=1up;seq=5. To address those problems associated with the bancos and other issues stemming from use of the waters of the Rio Grande, an 1884 convention between the countries established the rules for determining the location of the international boundary when the behavior of the Rio Grande transferred tracts of land from one bank of the river to the other. *See* Convention Between the United States of America and the United States of Mexico Touching the International Boundary Line Where it Follows the Bed of the Rio Colorado, U.S.-Mex., Nov. 12, 1884, 24 Stat. 1011 [hereinafter Convention of 1884].[11] And in 1889, the countries ratified another convention to reconvene the International Boundary Commission and grant

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[11] The jurisdiction issues caused by the bancos were not the only issues affecting relations between the United States and Mexico at that time which the 1884 Convention was meant to address. *See, e.g.*, IRA G. CLARK, WATER IN NEW MEXICO: A HISTORY OF ITS MANAGEMENT AND USE 90 (1987) ("Friction continued to develop over diversions of water and the building of small restraining dams, a condition intensified by the river changing its course at each flood stage."); DOUGLAS R. LITTLEFIELD, CONFLICT ON THE RIO GRANDE: WATER AND THE LAW 1879-1939, at 19-20 (2008) (describing "tensions over irrigation supplies along the border between Texas and Mexico [increasing] to the point that rumors abounded regarding the supposed plans of armed Mexicans to destroy an American diversion dam at Hart's Mill (near present-day downtown El Paso on the Rio Grande)" and the petitions of residents to the El Paso County Commissioners' Court "[c]laiming that over the previous few years the waters of the Rio Grande had become insufficient to irrigate crops and water cattle . . . [and contending] that the shortages had brought immense hardships to the area[; therefore,] they sought a monetary grant to ease their burdens or, alternatively, relief from paying property taxes").

jurisdiction to that body to adjudicate disputes associated with the bancos, man-made diversions of water on both sides of the river, and the location of the boundary line in the context of the principles and rules adopted in the Convention of 1884. *See* Convention Between the United States of America and the United States of Mexico to Facilitate the Carrying Out of the Principles Contained in the Treaty of Nov. 12, 1884, and to Avoid the Difficulties Occasioned by Reason of the Changes Which Take Place in the Bed of the Rio Grande and that of the Colorado River, U.S.-Mex., Mar. 1, 1889, 26 Stat. 1512 [hereinafter Convention of 1889].

2. Resource disputes lead to a plan for an international dam and reservoir on the Rio Grande

Throughout the 1880s, as a result of a significant increase in population and development in the San Luis section of the Upper Rio Grande Basin as well as naturally occurring drought conditions, "water shortages occurred along the Rio Grande in Mesilla and El Paso Valleys and people near Juarez, across the river from El Paso, complained to the Mexican Government." *See* RIO GRANDE JOINT INVESTIGATION, at 8.[12] In 1888,

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[12] Reports from various sources also reported to Congress the problem experienced by residents on both sides of the stream during that time:

> In the report of the troubles on the Rio Grande, transmitted to the House of Representatives by the Secretary of War in 1878, Executive Document No. 84,

Congress appropriated funds pursuant to a March 20, 1888 joint resolution, *see* J. Res. 7, 50th Cong., 25 Stat. 618-19 (1888), to the United States Geological Survey ("USGS")

> [f]or the purpose of investigating the extent to which the arid region of the United States can be redeemed by irrigation, and the segregation of the irrigable lands in such arid region, and for the selection of sites for reservoirs and other hydraulic works necessary for

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Forty-fifth Congress, second session, Colonel Hatch says, among other things:

> One [trouble] which must be looked for sooner or later is in connection with the water taken from the Rio Grande for irrigation, as soon as the attempt is made to largely extend cultivation in this valley (there will not be enough water for all, and both sides have an equal right). From this troubles are certain to arise sooner or later which may involve the two countries seriously.
>
> . . . .

Then, in the [1889] report of General Stanley . . . to the Secretary of War, he uses this language:

> Our relations with our Mexican neighbors upon the long line of the Rio Grande have been kindly, although they are good deal excited over what they deem the violation of their riparian rights through our people taking all the water of the Rio Grande for the irrigation of the San Luis Valley, which leaves the Rio Grande a dry bed for 500 miles. The question is one that must be settled by the State Department, and thus far there has been no call for military force.

21 CONG. REC. 2341 (1890) (statements of Sen. Reagan).

> the storage and utilization of water for irrigation and the prevention of floods and overflows. . . .

Act of Oct. 2, 1888, ch. 1069, 25 Stat. 505, 526. At the same time, the city council of El Paso had approached Major Anson Mills, a resident and founder of El Paso and surveyor for the Army Corps of Engineers, to "submit to it a plan for water supply and irrigation that would overcome" the immediate drought conditions the residents of El Paso experienced. Letter from Anson Mills, Major Tenth Cavalry, to Thomas F. Bayard, U.S. Sec'y of State (Dec. 10, 1888), *in* INTERNATIONAL DAM IN RIO GRANDE RIVER, NEAR EL PASO, TEX., H.R. DOC. NO. 54-125, at 3 (1896). Major Mills, who had already received support for his idea from Major John Wesley Powell, the Director of the USGS, proposed to the United States Secretary of State that an international reservoir and dam be built at El Paso, funded jointly by the United States and Mexico, the details of which to be negotiated by

> a joint commission [comprised of members from the two countries] to draw up the necessary treaty stipulations to protect the work and the rights of all interested in them, the fundamental feature of which should certainly be that each nation should have the right to divert no more than one-third of the flow at any period, and that one-third of the flow should be maintained in the bed of the river, and that this international commission have charge and control of the work

> after completion as well as during construction.

Id. at 5.

After working with the USGS to research more thoroughly his idea for a federally funded, international reservoir and dam to solve the irrigation needs of El Paso and Juarez residents, Major Mills testified before a Senate committee in 1889, detailing his thoughts on the location and construction of the project, and also explaining his rationale for federal funding and oversight:

> Now, in regard to the construction of this dam – by whom should it be made – I would like to say this: I do not see how it will be possible to construct it by private enterprise; and for these reasons: It is international, in the first place, and it would be hard to get a charter from the two Governments that would sufficiently secure the investors in their rights to dividends. In our country it is very feasible, because here they can take a lien on the land for the money invested. In Mexico, however, it is different. The proprietors of this enterprise would necessarily be Americans, and there would be that doubt on the part of Mexico and on the part of the investors that they were fairly dealt with. Then, to control the boundary, I do not see how private individuals could do that.
>
> . . . .

> My idea would be for the Government to build the dam, build the reservoir, change the railroad, and provide how that water should be disposed of, and turn it over to a private corporation thereafter. That could be arranged.

REPORT OF THE SPECIAL COMMITTEE OF THE UNITED STATES SENATE ON THE IRRIGATION AND RECLAMATION OF ARID LANDS: VOL. III – ROCKY MOUNTAIN REGION AND GREAT PLAINS 16-17 (1890) (statement of Maj. Anson Mills), http://babel.hathitrust.org/cgi/pt?id=chi.73646723;view=1up;seq=7 (last visited Jan. 6, 2017). In addition to presenting a detailed plan for a reservoir and dam at El Paso, Major Mills also identified "a good site for a dam at Fort Selden," approximately sixty miles north of El Paso, near Elephant Butte, New Mexico, but opined that a reservoir at that site would hold a fraction of water compared to the one he proposed at El Paso. *Id.* at 16.

After those hearings, however, legislative attempts to solve irrigation problems by building the dam and reservoir recommended by Mills and the USGS stalled. Congress turned to the President in 1890, requesting him "to enter into negotiations with the Government of Mexico with a view to the remedy of all such [boundary and irrigation disputes]" on both sides of the Rio Grande, which Congress characterized as "a standing menace to the harmony and prosperity of the citizens of said countries, and the amicable and

orderly administration of their respective Governments." 21 CONG. REC. 3977 (1890) [hereinafter 1890 Concurrent Resolution].

3. The Republic of Mexico lodges a formal claim for damages alleging misappropriation of water from the Rio Grande by United States citizens

In October 1894, the Mexican ambassador to the United States forwarded a letter to the U.S. Secretary of State that he had received from the consul of Mexico at El Paso in an attempt "to solicit, very specially, an examination and decision of this grave question by the Department of State, in order that the evils referred to by the Mexican consul at El Paso, Tex., may be remedied." Letter from Matias Romero, Mexican Minister in Washington, D.C., to Walter Q. Gresham, U.S. Sec'y of State (Oct. 12, 1894), *in* THE EXECUTIVE DOCUMENTS OF THE HOUSE OF REPRESENTATIVES FOR THE THIRD SESSION OF THE FIFTY-THIRD CONGRESS 1894-95, at 395 (1895) [hereinafter CLEVELAND FOREIGN RELATIONS PAPERS]. The letter of the Mexican consul detailed tribulations caused by "the numberless drains which have been made by the farmers of Colorado and New Mexico, who have settled the pending questions [regarding the equitable division of the waters of the river] by appropriating the water of the Rio Grande to their own exclusive use." Letter from José Zayas Guarneros, Mexican Consul at El Paso, to Matias Romero, Mexican

Minister in Washington, D.C. (Oct. 4, 1894), *in* CLEVELAND FOREIGN RELATIONS PAPERS, at 396. Those tribulations included the "total destruction within perhaps two years" of agriculture, which, in turn, would "inevitably entail the ruin of the infant industries" and the depopulation of the city of Juarez. *Id.*

Although President Cleveland acknowledged in his annual address to Congress in December 1894 that "[t]he problem of the storage and use of the waters of the Rio Grande for irrigation should be solved by appropriate concurrent action of the two interested countries," CLEVELAND FOREIGN RELATIONS PAPERS, at *xi*, negotiations moved slowly. In October 1895, the Mexican ambassador to the United States sent another letter to the U.S. Secretary of State, complaining that the digging of "a great many trenches . . . in the State of Colorado (especially in the St. Louis [sic] Valley) and in the Territory of New Mexico, through which the Rio Grande and its affluents flow" resulted in the destruction of the navigability of the Rio Grande and the deprivation of water for irrigation downstream in violation of the 1848 Treaty of Guadalupe Hidalgo, the Convention of 1884, and international law. Letter from Matias Romero, Mexican Minister in Washington, to Richard Olney, U.S. Sec'y of State (Oct. 21, 1895), *in* THEODORE ROOSEVELT, JR., MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, TRANSMITTING A REPORT FROM THE SECRETARY OF STATE, WITH ACCOMPANYING PAPERS, IN REGARD TO THE EQUITABLE DISTRIBUTION OF THE WATERS OF THE RIO GRANDE [hereinafter ROOSEVELT PAPERS REGARDING THE EQUITABLE DISTRIBUTION OF RIO GRANDE

WATERS], S. DOC. NO. 57-154, at 7-8 (1903). As stated by the ambassador in his letter:

> The Government of Mexico thinks that according to Article VII of the treaty of Guadalupe Hidalgo of February 2, 1848, the inhabitants of one country [cannot], without the consent of the other, build any works that obstruct or impede navigation in international rivers, and nothing could impede it more absolutely than works which wholly turn aside the water of those rivers. It is true that Article IV of the treaty of Mesilla of December 30, 1853, annulled Article VII of the treaty of Guadalupe Hidalgo, but at the same time it left its stipulations in force, as far as the Rio Grande is concerned, from the point where that river begins to be the boundary line between the two countries, and moreover, by Article V of the convention of November 12, 1884, the right of both countries to that river was again recognized, and it was again stipulated that one could not construct any works that obstructed navigation therein without the consent of the other.
>
> . . . .
>
> Still, even supposing, without admitting it, that the Mexican Government's interpretation of the treaties were not well founded, and even if there were no stipulation on this subject between the two countries, the principles of international law would form a sufficient basis for the rights of the Mexican inhabitants of the bank of the Rio Grande. Their claim to

> the use of the water of that river is incontestable, being prior to that of the inhabitants of Colorado by hundreds of years, and, according to the principles of civil law, a prior claim takes precedence in case of dispute.

Id. at 8.

The U.S. Secretary of State requested a legal opinion from the U.S. Attorney General regarding the validity of Mexico's claims. *See* Letter from Richard Olney, U.S. Sec'y of State to Judson Harmon, U.S. Att'y Gen. (Nov. 5, 1895), *in* ROOSEVELT PAPERS REGARDING THE EQUITABLE DISTRIBUTION OF RIO GRANDE WATERS, at 9-10. Attorney General Harmon agreed that the Treaty of Guadalupe Hidalgo and the Convention of 1884 protected the rights of Mexico as to maintaining the *navigability* of the Rio Grande, but opined that those agreements applied only to the section of the river serving as the boundary between Mexico and the United States, observing that Mexico's claims pertained to interference with irrigation – not navigability of the river. *See* Letter from Judson Harmon, U.S. Att'y Gen., to Richard Olney, U.S. Sec'y of State (Dec. 12, 1895), *in* ROOSEVELT PAPERS REGARDING THE EQUITABLE DISTRIBUTION OF RIO GRANDE WATERS, at 10-13. As to the validity of Mexico's claim under international law, Attorney General Harmon analyzed several legal authorities pertaining to natural international servitudes and the overlay of the principle of absolute sovereignty of nations. *Id.* at 14-16. Ultimately, relying primarily upon Chief Justice John Marshall's opinion

in *The Schooner Exchange v. McFadden*, 11 U.S. (7 Cranch) 116, 136 (1812), he advised:

> The fundamental principle of international law is the absolute sovereignty of every nation as against all others within its own territory. Of the nature and scope of sovereignty with respect to judicial jurisdiction, which is one of its elements, Chief Justice Marshall said:
>
> > The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.
> >
> > All exceptions, therefore, to the full and complete power of a nation within its own territories must be traced up to the consent of the nation itself. They can flow from no other legitimate source.
>
> . . . .
>
> It is not suggested that the injuries complained of are or have been in any measure due to wantonness or wastefulness in the use of water, or to any design or intention to injure. The water is simply insufficient to supply the needs of the great stretch of arid

> country through which the river, never large in the dry season, flows, giving much and receiving little.
>
> The case presented is a novel one. Whether the circumstances make it possible or proper to take any action from consideration of comity is a question which does not pertain to this Department; but that question should be decided as one of policy only because, in my opinion, the rules, principles, and precedents of international law impose no liability or obligation upon the United States.

Id. at 15-16 (internal citation omitted).[13] In sum, Attorney General Harmon's opinion stated that the United

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[13] The concept that a sovereign country may dispose of its resources within its own boundaries regardless of the consequences of that action in a neighboring sovereign country became known as the "Harmon Doctrine." In his article questioning the Harmon Doctrine's inclusion in international law, Professor Stephen McCaffrey writes:

> It is remarkable that Attorney General Harmon rested his entire case upon two brief paragraphs from an old Supreme Court decision that he did not proceed to apply to the facts before him. It is true that the Supreme Court's opinion was written by one of the greatest jurists ever to sit on the Court, Chief Justice John Marshall. But could such a great judge, even in the early years of the nineteenth century, have in fact intended to make pronouncements about sovereignty that are as absolute and inflexible as they appear to be in Harmon's opinion? Reading two sentences beyond the end of Harmon's quotation from the decision supplies the answer. Chief Justice Marshall wrote:
>
> > The world being composed of distinct sovereignties, possessing equal rights and equal

States had no duty toward Mexico regarding the alleged water misappropriation by U.S. citizens.

4. The Harmon Doctrine is rejected in favor of referring the international dispute to the International Boundary Commission for amicable solutions

Despite the advice contained in Attorney General Harmon's opinion, the State Department continued to work toward a solution. Ultimately, pursuant to the 1890 Concurrent Resolution, the countries issued a

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> independence, whose mutual benefit is promoted by intercourse with each other, . . . all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers. . . .
>
> A nation would justly be considered as violating its faith, although that faith might not be expressly plighted, which should suddenly and without previous notice, exercise its territorial powers in a manner not consonant to the usages and received obligations of the civilized world.

Marshall thus recognized that the realities of the international intercourse and interdependence meant that states often did not insist upon "that absolute and complete jurisdiction within their respective territories which sovereignty confers."

Stephen C. McCaffrey, *The Harmon Doctrine One Hundred Years Later: Buried, Not Praised*, 36 NAT. RESOURCES J. 725, 744 (1996) (quoting *The Schooner Exchange v. McFadden*, 11 U.S. (7 Cranch) 116, 136-37 (1812)).

protocol on May 6, 1896, referring the issue of Mexico's claim to the International Boundary Commission for investigation and report on three specific topics:

> It being essential to the conduct of the negotiations contemplated by the concurrent resolution of the Congress of April 29, 1890, that there should be a definite and authoritative ascertainment of the facts relating to the irrigation of the arid lands in the valley of the Rio Grande River, to the construction of a dam across said river at El Paso, Tex., and to the other subjects [*sic*] matter of said resolution:
>
> And the Mexican Government deeming that it is of vital interest for the Republic and especially for the inhabitants of the right bank of the Rio Bravo (Grande) to contribute for their part to preparing the means for carrying out the negotiations recommended in the aforesaid resolution of the Congress of the United States of America;
>
> Col. Anson Mills and Señor Don F. Javior Osorno, members of the International Boundary Commission organized under the convention of March 1, 1889, are hereby requested and directed to investigate and report, as soon as practicable, upon the questions and matters following, to wit:
>
> 1. The amount of water of the Rio Grande taken by the irrigation canals constructed in the United States of America.
> 2. The average amount of water in said river, year by year, before the construction

> of said irrigation canals and since said construction – the present year included.
>
> 3. The best and most feasible mode, whether through a dam to be constructed across the Rio Grande near El Paso, Tex., or otherwise, of so regulating the use of the waters of said river as to secure to each country concerned and to its inhabitants their legal and equitable rights and interests in said waters. . . .

Protocol Relating to the Irrigation of the Arid Lands in the Valley of the Rio Grande River and to the Construction of a Dam Across Said River, Mex.-U.S., May 6, 1896, *reprinted in United States-Mexico Water Boundary: Hearings Before the Comm. on Foreign Affairs Relative to the International (Water) Boundary Comm'n, United States and Mexico*, 63d Cong. 38 (1914), http://catalog.hathitrust.org/Record/100734841 (last visited Jan. 6, 2017).

Based upon a request from Anson Mills as Commissioner of the International Boundary Commission,[14] the Secretary of the Interior of the United States directed the Commissioner of the General Land

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[14] *See* Letter from Anson Mills, Col., Third Cavalry, U.S. Army, to Richard Olney, U.S. Sec'y of State (Nov. 17, 1896), *in* WILLIAM MCKINLEY, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, TRANSMITTING, IN RESPONSE TO RESOLUTION OF THE SENATE OF FEBRUARY 26, 1898, REPORTS FROM THE SECRETARY OF STATE, THE SECRETARY OF WAR, THE SECRETARY OF THE INTERIOR, AND THE ATTORNEY-GENERAL, WITH ACCOMPANYING PAPERS, RELATIVE TO THE EQUITABLE DISTRIBUTION OF THE WATERS OF THE RIO GRANDE RIVER, S. DOC. NO. 55-229, at 11-14 (1898).

Office in December 1896 "to suspend action on any and all applications for right of way through public lands for the purpose of irrigation by using the waters of the Rio Grande or any of its tributaries in the State of Colorado or in the Territory of New Mexico until further instructed by this department." Letter from D.R. Francis, Sec'y of the Interior, to Comm'r of the Gen. Land Office (Dec. 5, 1896), *in* WALTER L. FISHER, LETTER FROM THE SECRETARY OF THE INTERIOR, TRANSMITTING, BY DIRECTION OF THE PRESIDENT, ORDERS AND REGULATIONS OF THE INTERIOR DEPARTMENT TOUCHING USE, APPROPRIATION, OR DISPOSITION FOR IRRIGATION OF THE WATERS OF THE RIO GRANDE AND ITS TRIBUTARIES IN COLORADO AND NEW MEXICO [hereinafter FISHER PAPERS REGARDING APPROPRIATION OF WATERS OF THE RIO GRANDE], H.R. DOC. 62-39, at 2 (1911); *see also* 66 CONG. REC. 593 (1924) (attaching letter as Exhibit E).[15]

The International Boundary Commission issued its report on November 25, 1896, and reported increases in irrigation of acreage in Colorado and New Mexico from 1880 to 1896, directly resulting in a marked decrease in annual flow of the river at El Paso:

> From the very elaborate statistical report of Civil Engineer Follett the commission finds that prior to 1880 there were in Colorado 511

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[15] The perpetual nature of the December 1896 embargo preventing new grants of rights-of-way would become the significant source of contention years later for irrigators in Colorado's San Luis Valley and the Middle section of the Upper Rio Grande Basin in New Mexico. *See* discussion *infra* Part III.E.

canals taken from the Rio Grande and its tributaries, irrigating about 121,000 acres of land; that this number of canals and amount of land irrigated has kept increasing year by year, many of the canals being enlarged during the same period, so that the number of canals at this date has increased to 925, irrigating 318,000 acres of land; and that in New Mexico there were, prior to 1880, 563 canals taken from the Rio Grande and its tributaries, irrigating 183,000 acres of land, and at the present time there are 603 canals, irrigating 186,000 acres of land.

These results show an aggregate of 1,074 canals taken out in Colorado and New Mexico prior to 1880, and 1,528 taken from the river and its tributaries at this date, showing an increase of 454 canals and of 196,000 acres irrigated in the State of Colorado and Territory of New Mexico. This shows quite accurately the increase for the past sixteen years. There are no reliable records available showing the increase in the preceding years, but they were doubtless on a more rapidly increasing ratio.

It will also be observed that the greatest increase during these sixteen years was in the State of Colorado, the number of canals and acres irrigated remaining almost stationary in New Mexico for that period, but this is easily accounted for by the fact that the appropriation of water in Colorado has rendered such a scarcity in New Mexico that little further increase of canals and acreage was profitable.

> It is evident to the commissioners that as the flow of water in the Rio Grande had not only become scarce at El Paso, but high up in New Mexico prior to 1888 or 1889, any increase of water used in Colorado would diminish materially the flow at El Paso during the irrigation season.
>
> . . . .
>
> [Based on] the large mass of information and statistics taken by our engineers [to answer the question charged to the International Boundary Commission regarding the average amount of water in the Rio Grande, year by year, before and after the construction of irrigation canals in Colorado and New Mexico to date], we form the following conclusions:
>
> That the flow of the river at El Paso has now been decreased by the taking of water for irrigation by canals constructed in the United States of America, about 1,000 second-feet for one hundred days annually, equal to 200,000 acre-feet of water.

Letter from Anson Mills, Col. Third Cavalry, U.S. Army & Comm'r of the Int'l Boundary Comm'n, John A. Harper, Sec. of the Int'l Boundary Comm'n, F. Javier Osorno, Mexican Comm'r of the Int'l Boundary Comm'n & S.F. Maillefert, Mexican Sec. of the Int'l Boundary Comm'n, to Richard Olney, U.S. Sec'y of State (Nov. 25, 1896), *in* WILLIAM MCKINLEY, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, TRANSMITTING, IN RESPONSE TO RESOLUTION OF THE SENATE OF FEBRUARY 26, 1898, REPORTS FROM THE SECRETARY OF

STATE, THE SECRETARY OF WAR, THE SECRETARY OF THE INTERIOR, AND THE ATTORNEY-GENERAL, WITH ACCOMPANYING PAPERS, RELATIVE TO THE EQUITABLE DISTRIBUTION OF THE WATERS OF THE RIO GRANDE RIVER, S. DOC. NO. 55-229, at 38-39 (1898) [hereinafter MCKINLEY PAPERS ON EQUITABLE DISTRIBUTION OF RIO GRANDE WATERS]. The Commission proposed the following plan – essentially the plan Anson Mills originally proposed to the U.S. Secretary of State in 1888 – to regulate the water of the Rio Grande and resolve Mexico's claim:

> (1) That the United States cede to Mexico the small tract of land before referred to [to allow Mexico to own one end of the dam and have access to the lake for the purpose of conducting its share of the waters impounded through its own territory], but reserving corporate rights of the Southern Pacific Railway Company to the United States.
>
> (2) Construct the dam [at El Paso] as designed by the joint engineers.
>
> (3) Remove the railroads from the bed of the proposed reservoir.
>
> (4) Acquire the land to be submerged.
>
> (5) And in some way prevent the construction of any large reservoirs in the Rio Grande in the Territory of New Mexico, or in lieu thereof, if that be impracticable, restrain any such reservoirs hereafter constructed from the use of any waters to which the citizens of the El Paso Valley, either in Mexico or the

> United States, have right by prior appropriation, and provide some legal and practicable remedy and redress, in case such waters should be used, to the citizens of both countries.

Id. at 41. The proposal further provided that the reservoir and dam would be jointly owned by the two countries and, in exchange for "Mexico relinquish[ing] all claims for indemnity for the unlawful use of waters in the past, and accept the dam so constructed as an equitable distribution, past and future, of the waters of said river," the United States would fund the entire project. *Id.*

Once the International Boundary Commission released its report in November 1896, recommending the construction of an international reservoir and dam at El Paso, the Mexican government supported the idea and entered into negotiations with the United States for a convention between the two countries which would conform to the specific recommendations of the International Boundary Commission. *See, e.g.*, Letter from Matias Romero, Foreign Minister, to Richard Olney, U.S. Sec'y of State (Dec. 29, 1896), *in* McKinley Papers on Equitable Distribution of Rio Grande Waters, S. Doc. No. 55-229, at 178; Letter from Richard Olney, U.S. Sec'y of State, to Matias Romero, Foreign Minister (Jan. 4, 1897), *in* McKinley Papers on Equitable Distribution of Rio Grande Waters, S. Doc. No. 55-229, at 179; Letter from Matias Romero, Foreign Minister, to Richard Olney, U.S. Sec'y of State

(Jan. 5, 1897), *in* McKinley Papers on Equitable Distribution of Rio Grande Waters, S. Doc. No. 55-229, at 179-81 (attaching draft convention); Letter from Matias Romero, Foreign Minister, to Richard Olney, U.S. Sec'y of State (Jan. 30, 1897), *in* McKinley Papers on Equitable Distribution of Rio Grande Waters, S. Doc. No. 55-229, at 181-84 (attaching subsequent draft convention); Letter from Richard Olney, U.S. Sec'y of State, to Matias Romero, Foreign Minister (Mar. 3, 1897), *in* McKinley Papers on Equitable Distribution of Rio Grande Waters, S. Doc. No. 55-229, at 184.

5. A competing plan for a privately funded reservoir and dam on the Rio Grande interferes with the negotiation of a convention between the United States and Mexico

But a wrinkle existed that interfered with the negotiations between the United States and Mexico: Anson Mills' proposal for a federally funded, international reservoir and dam was not the only irrigation proposal circulating during the 1880s. Interstate disputes between residents of the State of Texas and then-territory New Mexico over use of Rio Grande waters also festered, complicated by the uncertainty of local, territorial, and state authority over water rights. And so private equity, specifically the Rio Grande Dam and Irrigation Company, appeared and sought to build a reservoir and dam in New Mexico at Elephant Butte,

the site that was brushed aside earlier by Mills, who favored building a dam and reservoir at El Paso.

As recounted in 1901 by Nathan E. Boyd, Director-General of the Rio Grande Dam and Irrigation Company:

> From time to time during the past twenty years and more[,] various means of raising capital for the construction of a great storage dam to impound the flood waters of the river have been proposed by citizens of the Territory [of New Mexico]. Government aid has again and again been sought and investment of private capital solicited, but without avail. At one time the Federal Government appeared seriously to entertain plans, recommended by the Irrigation Bureau, for the construction of a series of storage dams. Reservoir sites on the Rio Grande were surveyed by Government engineers, who reported favorably on the proposition, and these sites were duly reserved, but nothing came of it, and ultimately they were thrown open for public appropriation (act of 1891) for reservoir purposes.
>
> In 1893 the Rio Grande Dam and Irrigation Company was incorporated under the laws of New Mexico. All the requirements of the Territorial and Federal statutes were complied with in order to legally establish the reservoir rights essential to the company's undertaking. . . .

[After an English company was formed, taking advantage of England's laws holding directors of a company personally liable and soothing anxieties of investors who mistrusted American industrial securities] to issue 8 per cent preference shares and 5 per cent debenture bonds (the former at par, the latter at a premium of 5 per cent), to be secured by a lease of the American company's undertaking, . . . [w]ork on the proposed dams and canals was begun [at the Elephant Butte site]; a great colonization system was organized; branch offices and agencies were established in Great Britain and on the Continent, and the company's literature, descriptive of the climatic and other advantages offered to settlers in the valley and of the resources of the Territory, was printed in English and French and widely circulated; contracts for the sale of large blocks of land for fruit and vine culture were made, the company undertaking to provide water within two years; agreements were entered into with the owners of the community ditches in the valley whereunder the American company would concede water rights to the landowners along such ditches in exchange for the community ditches and for blocks of land, the farmers to pay an annual water rent of $1.50 per acre for every acre irrigated. In fact, everything conducive to the colonization and development of the valley which good management could suggest and capital secure was provided for.

Letter from Nathan E. Boyd, Dir.-Gen., Rio Grande Dam & Irrigation Company, to Honorable Members of the United States Senate (Jan. 10, 1901), *in* S. COMM. ON FOREIGN RELATIONS, HISTORY OF THE RIO GRANDE DAM AND IRRIGATION COMPANY, S. DOC. NO. 56-104, at 3-4 (1901) [hereinafter 1901 Boyd Testimony].

Formed in 1893, the activities and proposed diversions of the Rio Grande by the Rio Grande Dam and Irrigation Company immediately drew the ire of downstream inhabitants. In 1896, citizens of Mexico urged their government to intercede on their behalf to insist that the United States suspend all work of the Rio Grande Dam and Irrigation Company in its construction of a reservoir and dam at Elephant Butte. *See, e.g.*, Letter from Matias Romero, Foreign Minister, to Richard Olney, U.S. Sec'y of State (Aug. 4, 1896), *in* MCKINLEY PAPERS ON EQUITABLE DISTRIBUTION OF RIO GRANDE WATERS, S. DOC. NO. 55-229, at 2-3 (1898) (attaching translation of a June 22, 1896, letter from a representative of Mexican citizens to the Mexican Secretary of Foreign Relations).

Although by 1897, the United States and Mexico had embraced the recommendations of the International Boundary Commission and had entered negotiations regarding the international, U.S.-funded reservoir and dam at El Paso, the United States had a problem: What to do about the water rights and rights of way provisionally given by the U.S. Secretary of the Interior (and the application for water rights submitted to Territory of New Mexico) for the Rio Grande

Dam and Irrigation Company to construct the Elephant Butte reservoir and dam? As explained to the Mexican Foreign Minister by the U.S. Secretary of State:

> I must add, however, that in preparing to enter into negotiations the Department has found the subject embarrassed by greatly perplexing complications arising out of reservoir dams, etc., either already built or authorized through the concurrent action of the Federal and State authorities. Just what legal validity is to be imputed to such grants of authority, or in what way structures completed or begun are to be dealt with, are questions under careful investigation and which must be disposed of before the United States will be in a condition to negotiate.

Letter from Richard Olney, U.S. Sec'y of State, to Matias Romero, Foreign Minister (Jan. 4, 1897), *in* McKinley Papers on Equitable Distribution of Rio Grande Waters, S. Doc. No. 55-229, at 179. Practically speaking, it was clear that two reservoirs and dams on the Rio Grande within close proximity were hopelessly incompatible projects: "First, if the Rio Grande Company built the proposed dam at Elephant Butte, a reliable water supply would not exist for the proposed international dam at El Paso[;] [s]econd, the proposed international dam would flood a substantial portion of the irrigated land in the Mesilla Valley [in New Mexico]."

William A. Paddock, *The Rio Grande Compact of 1938*, 5 U. DENV. WATER L. REV. 1, 11 (2001).[16]

The U.S. State Department coordinated with the Departments of War and Justice to assess those issues. Secretary of State Olney wrote to the Secretary of War to ascertain whether he characterized the Rio Grande as a "navigable water," in which case, pursuant to applicable law, the Rio Grande Dam and Irrigation

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[16] In November 1896, when the International Boundary Commission released its recommendations for an internationally funded dam and reservoir at El Paso, Anson Mills saw that the privately funded dam at Elephant Butte would interfere with the Commission's proposal. He made a request to Secretary of State Richard Olney

> that if practicable the approval of the reservoir of the Rio Grande Land and Irrigation Company, Limited, at Elephant Butte be canceled or withdrawn, and, if not practicable to cancel or withdraw the same, that such executive or legislative restriction be placed upon it as to prohibit it from using any part of the flow of the river to which the inhabitants of either bank of the river below may have a prior right by appropriation, and that some prompt and efficient remedy be provided the possessors of these prior rights by appropriation in case the company should use any water to which the inhabitants referred are entitled.

Letter from Anson Mills, Col., Third Cavalry, U.S. Army, to Richard Olney, U.S. Sec'y of State (Nov. 17, 1896), *in* WILLIAM MCKINLEY, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, TRANSMITTING, IN RESPONSE TO RESOLUTION OF THE SENATE OF FEBRUARY 26, 1898, REPORTS FROM THE SECRETARY OF STATE, THE SECRETARY OF WAR, THE SECRETARY OF THE INTERIOR, AND THE ATTORNEY-GENERAL, WITH ACCOMPANYING PAPERS, RELATIVE TO THE EQUITABLE DISTRIBUTION OF THE WATERS OF THE RIO GRANDE RIVER, S. DOC. NO. 55-229, at 13 (1898).

Company would have been required to obtain the permission from the Secretary of War as "a necessary prerequisite to the lawful erection of the dam." *See* Letter from Richard Olney, U.S. Sec'y of State, to Daniel S. Lamont, U.S. Sec'y of War (Jan. 13, 1897), *in* McKinley Papers on Equitable Distribution of Rio Grande Waters, S. Doc. No. 55-229, at 25. The Secretary of State reminded the Secretary of War that

> [s]ection 10 of the act of September 19, 1890, is a general provision enforcible in the courts under the direction of the Attorney-General of the United States, and his aid would necessarily be invoked by you should you determine to put this provision of law in force against the Rio Grande Dam and Irrigation Company's obstruction of the river at Elephant Buttes [sic].

Id. at 26. After finding that the Rio Grande was indeed navigable,[17] and, therefore, the building of a dam at

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[17] The War Department received advice regarding "the navigability of the Rio Grande River as affecting the validity of the claim to the right to dam the river at Elephant Butte, made by the Rio Grande Dam and Irrigation Company" from an engineer who served on the International Boundary Commission:

> The periods of high water recur annually with regularity, and at such times the river is unquestionably navigable at and above El Paso, and could certainly be used in commerce for floating logs and flatboats. I have no knowledge of the fact that this portion of the river has ever been put to such use, the country being but sparsely settled and timber being exceedingly scarce. But the issue is not whether the river has been actually navigated, but whether it is navigable within the meaning of the law, so that it can be classified as

Elephant Butte required the approval of the War Department, the Secretary of War requested advice from the U.S. Attorney General's Office as to how to proceed, which concluded:

> (1) That the Secretary of the Interior had no power, under the provisions of the act of March 3, 1891 . . . to grant the rights claimed.
>
> (2) That the remedy of the United States is by injunction under section 10 of the act of

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navigable waters of the United States entitled to the protection of the Secretary of War under the act of September 19, 1890.

As many rivers of the country have been so classified which in point of depth, volume, and regularity of flow offer fewer advantages to navigation than does the Rio Grande at El Paso, it seems clear to me that this stream should also be so classified.

Further, it would appear from the inclosed [sic] papers that it has heretofore been decided that the Rio Grande is navigable at and below a point 150 miles below El Paso, and since the river receives no important tributary within this 150 miles of its course, it is manifest that a dam at Elephant Butte which would entirely stop the flow at El Paso would necessarily injuriously "modify the capacity of the channel" of the river in that part of its course where it has heretofore been held to be navigable.

From either of these standpoints it would appear that the plans of the Rio Grande Dam and Irrigation Company require the approval and authorization of the Secretary of War.

Letter from G.M. Derby, Capt. U.S. Army Corps of Engineers, to W.P. Craighill, Brig. Gen., U.S. Army Corps of Engineers (Feb. 1, 1897), *in* McKinley Papers on Equitable Distribution of Rio Grande Waters, S. Doc. No. 55-229, at 185-86.

> September 19, 1890 . . . and if the dam has been constructed, also by criminal prosecution.
>
> Upon being advised that the obstruction has been or is about to be erected, I shall at once order proper proceedings to be instituted by the United States district attorney. . . .

Letter from Holmes Conrad, Solicitor-General, to Russell A. Alger, Sec'y of War (Apr. 24, 1897), *in* McKinley Papers on Equitable Distribution of Rio Grande Waters, S. Doc. No. 55-229, at 189-90.

The United States intervened in 1897 to halt construction of the Rio Grande Dam and Irrigation Company's construction of the dam and reservoir at Elephant Butte. The legal challenges by the United States were predicated upon the theory that the "Rio Grande is a navigable river, and that the proposed dam will obstruct the navigation of the river, the flow of waters therein, and interfere with its navigable capacity; and that such obstructions would be contrary to the treaty with Mexico, and in violation of the acts of congress." *United States v. Rio Grande Dam & Irrigation Co.*, 9 N.M. 292, 295 (1898). The litigation lasted years. *See, e.g.*, *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 710 (1899) (reversing the holding of the New Mexico high court, remanding, and ordering "an inquiry into the question whether the intended acts of the defendants in the construction of a dam and in appropriating the waters of the Rio Grande will substantially diminish the navigability of that stream within the limits of present navigability"); *United*

States v. Rio Grande Dam & Irrigation Co., 184 U.S. 416, 424 (1902) (reversing the holding of the New Mexico high court and remanding "with direction to grant leave to both sides to adduce further evidence," as "it is quite clear that the record does not contain evidence of a material character" and "the questions presented may involve rights secured by treaties concluded between this country and the Republic of Mexico").

In the end, Nathan Boyd and the Rio Grande Dam and Irrigation Company won battles, but lost the war. In April 1903, the United States filed a supplemental complaint against the Rio Grande Dam and Irrigation Company, alleging that its right to construct the dam and reservoir had expired, as the 1891 General Revision Act required reservoir projects to be at least partially constructed, if not completed, within five years of obtaining the right. *See United States v. Rio Grande Dam & Irrigation Co.*, 13 N.M. 386, 395 (1906). In 1909, the Supreme Court affirmed the lower court's ruling that the Rio Grande Dam and Irrigation Company's right had expired for non-use; thus ended the privately funded dam and reservoir project. *See Rio Grande Dam & Irrigation Co. v. United States*, 215 U.S. 266, 277-78 (1909).

Although it appeared that the litigation to stop the privately funded dam and reservoir at Elephant Butte would clear the path for the international convention with Mexico to resolve its claim for damages, the U.S. Attorney General's intervention did not proceed unnoticed by citizens of New Mexico. *See, e.g.*, Letter from Frank Burke to President William McKinley (Aug. 7,

1897), *in* MCKINLEY PAPERS ON EQUITABLE DISTRIBUTION OF RIO GRANDE WATERS, S. DOC. NO. 55-229, at 195-96 ("Your Attorney-General stopped us from building our dam on the grounds that we would obstruct navigation, yet the Mexican people have their dam in [El Paso]. . . . I am a lifelong Republican, and I am sure we feel the Attorney acts in our party in southern New Mexico. We fail to see where the protection comes in, as it is only helping old Mexico."). And the protracted litigation did not go smoothly for the United States. The United States would not prevail in the litigation against the Rio Grande Dam and Irrigation Company until 1909, leaving Mexico's claim for damages an open wound for years.

C. Legislative Attempts Toward Solving the Problems Regarding Reclamation of the Western Arid States, Including the Equitable Distribution of the Waters of the Rio Grande

1. The debate between cession versus a comprehensive federal scheme for reclamation of western arid lands leads to the 1902 Reclamation Act and the creation of the Reclamation Service

Throughout the late 1880s and early 1890s, Congress received scores of petitions from individuals and legislatures of western states to fund reclamation projects; all petitions were referred to the Select Committee on Irrigation and Reclamation of Arid Lands. *See,*

e.g., 21 CONG. REC. 142 (1889) (presenting "a communication from the acting secretary of the Territory of Arizona, inclosing a memorial of the fifteenth Legislative Assembly of the Territory of Arizona, relating to the construction of a storage reservoir for the reclamation of arid land"); 21 CONG REC. 353 (1889) (presenting "a memorial of 180 farmers, residents of Edmunds County, South Dakota, showing that the rainfall in that locality is insufficient for successful farming, and praying for such assistance from the Government as may be consistently rendered to obtain water for the purposes of irrigation"); 21 CONG. REC. 383 (1890) (presenting "a petition of the fruit-growers of California, praying for the irrigation of arid lands"); 21 CONG REC. 9777 (1890) (presenting "the petition of J.H. Hanna and 69 other citizens of Chase County, Nebraska, praying that an appropriation be made in aid of irrigation"); 22 CONG. REC. 2373 (1891) (presenting "the petition of the Legislature of the State of Kansas, praying for the adoption of a system of irrigation and the appropriation of the sum of money necessary therefor").

In 1894, Congress enacted the Carey Act, named for Senator Joseph M. Carey of Wyoming. *See* Act of Aug. 18, 1894, ch. 301, § 4, 28 Stat. 422 (codified as amended at 43 U.S.C. §§ 641-648). Representative Francis Griffith Newlands of Nevada summarized the climate existing prior to the Carey Act's passage as he argued in favor of the Act:

> [T]he arid-land question has been agitated for a great many years, not only in the western regions of our country, but in the

Halls of Congress. Conventions have been held throughout the West upon this important subject, and the unanimous sentiment is now, after long discussion, that the question of the reclamation of these arid lands can be settled alone by the respective States. They have come to that conclusion, though they desired in the first place that the Government of the United States should undertake the work of reclamation and should then open the reclaimed lands to settlement.

The Government of the United States has been unwilling to do that, for the reason that it involved the selection of vast areas of land, the erection of irrigation works, reservoirs, distributing canals, etc., and the expenditure of a sum ranging from $10 to $50 per acre in the work of reclamation. The National Government is unwilling to undertake the work, though the States in the arid region desired it to do so, and through it ought to do so.

Various measures have been introduced in Congress with reference to the granting of these arid lands to the various States. Measures looking to this end have repeatedly passed one House and failed of consideration in the other. Committees have passed upon the question in various forms. I think I am safe in saying that it is almost the unanimous sentiment of the various irrigation committees of this Congress and of past Congresses that grants of these lands should be made to

> the States, and that they should undertake the work of reclamation.

26 CONG. REC. 8427 (1894).

The Carey Act attempted to encourage settlement of public lands in western states that required irrigation for productive farming by allowing the federal government through the General Land Office to transfer up to one million acres of public lands to individual western States that established federally approved reclamation programs. 28 Stat. at 422.[18] The States themselves would not necessarily be required to fund or establish reclamation projects; rather, the States could contract with private companies to finance the projects and profit from selling the water at rates regulated and fixed by the State. *Id.* Once the State or private company recouped its investment plus a set profit, "any surplus of money derived by any State from the sale of said lands in excess of the cost of their reclamation, [would] be held as a trust fund for and be applied to the reclamation of other desert lands in such State." *Id.* at 423. Construction and settlement of the reclamation projects had to be completed within ten years. *Id.* at 422. The States were responsible not only for identifying the land, but also for soliciting farmers and settlers according to established criteria, usually including paying fee for the land and promising to cultivate a certain percentage of the land; but "said States shall not sell or dispose of more than one hundred and

[18] Notably, territories such as Arizona and New Mexico were excluded from the Carey Act.

sixty acres of said lands to any one person." *Id.* at 422-23. If settlers complied with cultivating at least twenty acres of the 160 acres granted to them, they could ultimately obtain the deed to those acres. *Id.* at 422.

Although some states achieved successes under the Carey Act, historians consider the Act a dismal failure for the most part:

> [The Carey Act] was designed to serve the needs of those states whose largest streams still carried plenty of unclaimed water, such as Wyoming, Montana, and Idaho. The law contained nothing that would encourage private companies to build expensive *storage* projects, and it assumed a very low per-acre cost for water. . . .
>
> . . . .
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> Oddly, the most obvious question about the Carey Act – how it could manage to lure farmers west in the midst of a depression – was never asked. . . .
>
> . . . .
>
> The Carey Act companies quickly ran out of money; the expected wave of new farmers never materialized; and those who came had too little capital to carry them through the lean months and years before their farms began to pay. Moreover, the projects were far removed from rail lines and major markets. Worst of all, the 1894 law did not provide adequate protection against speculators. The

> Carey Act could work only if the land to be reclaimed was segregated and reserved *immediately*. The first applications for Carey Act land sent to the General Land Office received no response for months. . . .

PISANI, TO RECLAIM A DIVIDED WEST, at 252-54, 260; *see also* John E. Thorson, Ramsey Laursoo Kropf, Dar Crammond & Andrea K. Gerlak, *Dividing Western Waters: A Century of Adjudicating Rivers and Streams*, 8 U. DENV. WATER L. REV. 355, 382-83 (2005).

Amid conflicts between agricultural and grazing interests in the western States,[19] as well as between western States' desires to develop agriculture within their borders and eastern States' desires to protect their own economies,[20] a debate emerged between cession and an overarching federal scheme as the best

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[19] *See generally* PISANI, TO RECLAIM A DIVIDED WEST, at 225-72, 294-98.

[20] Annual appropriations granted under the Rivers and Harbors Act became a battle ground between eastern and western States. Historically, the federal government had funded improvements to river channels and harbors; by 1886, annual appropriations had become considerable. *See* Act of Aug. 5, 1886, ch. 929, 24 Stat. 310 (appropriating over $100 million "for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes"). Indeed, the annual appropriations made via the Rivers and Harbors Act were viewed as a cash cow for states across the nation. As described by Senator Francis Warren of Wyoming:

> I maintain that the river and harbor bill may be dumped into the wastebasket this morning and the country go on just the same. There is not a single dollar in all the twenty-eight or thirty million dollars carried in the bill, exclusive of the Nicaragua Canal and nearly

> one hundred and fifty million including it, that we cannot get along without expending.
>
> Nobody is subsisting on it; nobody's distress is relieved by it. What is it, then? It is simply a dividend declared by this nation and distributed over it for the benefit of trade and commerce. That is all there is of it, and there need be no concealment. If it was truly a river and harbor bill, Simon pure, to improve some river or harbor most necessary for ships to go in and out through, we would not find 15 or 16 rivers and creeks that we had never heard of before and we [cannot] find on any official map generously provided for with appropriations in this bill. Not at all.

32 CONG. REC. 2278 (1889); *see also* 34 CONG. REC. 3552 (1901) ("For many years I have witnessed the growth of this bill. The country has witnessed it. There need be no mistake about that. This river and harbor bill is known to people in the backwoods counties of every State in the Union as 'the pork bill.' Men who have never seen a harbor know that there is something wrong about the way this bill is put together.") (statements of Sen. Thomas H. Carter of Montana).

In 1899, senators from Montana and Wyoming offered amendments to the Rivers and Harbors bill for the purpose of constructing reclamation projects in those States, but the bill was opposed by many senators from eastern States, worried that western States would compete unfairly with eastern U.S. farmers:

> I do not look grudgingly at the development of the West or its resources, mineral and agricultural as well, but I only called attention to the fact that [the proposed amendments] would impose an unequal burden of taxation to develop the agricultural resources of any part of this country at the expense of another, and that the exercise of which I conceive to be an unconstitutional power would result in just that thing and justify the wisdom of those who made the great charter of our Government in withholding from the Government the power to thus discriminate.
>
> I welcome every advance made by the part of the country, teeming with great resources, from which the

way to reclaim western arid lands. Cessionists advocated for public or surplus lands to be transferred by the federal government to individual States in order for those States, or private enterprise, to construct and operate reclamation projects under state law. *See, e.g.*, 30 CONG. REC. 853 (1897) (introducing and debating S. 372 that would cede all public lands to the

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> Senator comes and which he so ably represents. Every addition that it makes to its own prosperity is an addition to the common weal. I know that. I do not envy him or grudge him his silver and his gold and his golden fleeces.
>
> . . . .
>
> I do not grudge him, but all I want is that he shall be content with the bountiful gifts of Providence that have been with such a lavish hand distributed to that glorious country, and not seek to take a tail of taxation from the poor farmers east of the Mississippi in order to increase what has already so bountifully been supplied.

32 CONG. REC. 2278 (1889) (statements of Sen. George Gray of Delaware). Senator Warren countered by arguing that western States, in fact, had been subsidizing eastern States annually through the Rivers and Harbors Act appropriations, as evidenced by the fact that, in the proposed bill, "for the subdivisions of the United States there are more than $30,000,000 appropriated by the bill," and "of the nineteen or twenty-two political divisions covering the western half of the country, there is a paltry and measly sum of $2,000,000 only." *Id.* The proposed 1899 amendments appropriating funds to western States did not pass, even after a valiant effort by Senator Warren to block the entire Rivers and Harbors Act by filibuster. But when western States proposed similar amendments to the 1901 Rivers and Harbors bill, which were again rejected by eastern interests, Senator Carter of Montana filibustered successfully, defeating the entire 1901 bill, ensuring that no state received appropriations that year under the Rivers and Harbors Act. *See* 34 CONG. REC. 3519-62.

states for purposes including education and irrigation). Cession would ensure state control over water. As pressed in 1897 by Senator John Tyler Morgan of Alabama:

> There is another question that would follow along with this, which is about to produce a good deal of legislation here, perhaps some of it a little wild, some of it a slight strain upon the constitutional authority of Congress, and that is the subject of irrigation. If you will give all these public lands to the different States, they will undertake systems of irrigation and carry them out in such a way as will enable them to develop untold thousands and millions of acres of land that are now fertile lands, but entirely unproductive for the want of water. That great question would be removed from [federal] jurisdiction and left in the hands of the States and Territories, where the ultimate purpose of all the revenues to be derived from the sale of public lands in the States and Territories is for education. Of course, *the incidental power of disposal would follow the grant*. The grant, as I propose to make it in this amendment, is a grant without condition. It merely indicates the purpose for which the grant is made, and that purpose is not a condition subsequent, upon which the grant would be declared void in the event that it was not executed.

Id. at 854 (emphasis added). On the other hand, "[t]he states that supported federal reclamation did so for very different reasons." PISANI, RECLAIM A DIVIDED

WEST, at 267. "For example, Arizona resented the fact that the territories were not included in the Carey legislation, and Kansas did so in part because it feared Colorado's control over the interstate streams the two states shared." *Id.*

But by 1900, faced with the lack of success of endeavors such as the Carey Act, the members of the Ninth National Irrigation Congress[21] passed a resolution advocating for a national reclamation scheme:

> We hail with satisfaction the fact that both of the great political parties of the nation in their platforms in the last campaign declared in favor of the reclamation of Arid America,[22] in order that settlers might build

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[21] The National Irrigation Congress

> had evolved into one of the most important forces behind federal involvement in reclamation in the western states. The delegates to these conferences included prominent state and national politicians, irrigation engineers, educators in the field of agriculture, members of commercial organizations, officials of private water companies, and other leaders of public opinion. . . .

LITTLEFIELD, *supra* note 11, at 105 (citations omitted).

[22] Representative Francis Newlands recounted before the House of Representatives in 1902:

> For years the arid States have been insisting upon some action by the Federal Government in reference to the arid public lands, composing as they do in some States 95 per cent of their entire area, and they have been insisting that it is the duty of the Government to prepare these lands for settlement, so that the States in which they are located may become populated.

homes on the public domain, and to that end we urge upon congress that national appropriations commensurate with the magnitude of the problem should be made for the preservation of the forests and the reforestation of denuded areas as national storage reservoirs and for the construction by the national government, as part of its policy of internal improvements, of storage reservoirs and other works for flood protection, and to save for use in aid of navigation and irrigation the waters which now run to waste, and for the development of artesian and subterranean sources of water supply.

They urged for a long time the cession of these lands to the States. But Congress, regarding this great public domain as a public trust, not to be lightly turned over to sparsely settled States to be managed according to the judgment or lack of judgment, the discretion or indiscretion, the honesty or dishonesty, the providence or improvidence, of State legislatures, regarding it as a heritage for the entire Union, to be preserved for our unborn millions, has refused in its wisdom a cession to the States. So, at last, after the subject had been debated in and out of Congress for twenty years or more, the two parties in 1896 met in their respective conventions and formulated their expression on this subject, almost identical in terms – certainly identical in spirit.

Both parties declared in favor of the reclamation of these arid lands by the National Government and the holding of such lands for actual settlers, and in so declaring they but followed the general sentiment of the country, which was against any abandonment of its trust by the National Government and its surrender to the States.

35 CONG. REC. 6673 (1902).

> The water of all streams should forever remain subject to public control, and the right to use of water for irrigation should inhere in the land irrigated and beneficial use be the basis, the measure and the limit of the right.
>
> The work of building the reservoirs necessary to store the floods should be done directly by the government under existing statutes relating to the employment of labor and hours of work, and under laws that will give to all American citizens fair and equal opportunity to get first employment and then a home on the land.
>
> We commend the efficient work of the various bureaus of the national Government in the investigation of the physical and legal problems and other conditions relating to irrigation, and in promoting the adoption of more effective laws, customs and methods of irrigated agriculture and urge upon congress the necessity of providing liberal appropriations for this important work.

PROCEEDINGS OF THE NINTH ANNUAL SESSION OF THE NATIONAL IRRIGATION CONGRESS, HELD AT CENTRAL MUSIC HALL, CHICAGO, ILL., Nov. 21-24 at 270-71 (1900), http://babel.hathitrust.org/cgi/pt?id=uc1.b2936543;view=1up;seq=7 (last visited Jan. 6, 2017).

In the first quarter of 1901, Representative Francis Newlands and others introduced competing and amended bills aimed at establishing a national reclamation scheme. *See, e.g.*, H.R. 13846, 56th Cong. (1901); H.R. 14088, 56th Cong. (1901); H.R. 14192, 56th Cong.

(1901); H.R. 14203, 56th Cong. (1901); H.R. 14250, 56th Cong. (1901); H.R. 14326, 56th Cong. (1901).[23] The highlights of the last bill introduced by Representative Newlands on March 1, 1901, provided that: (i) a reclamation fund would be created through the sale of the federal public lands in western States and would be dedicated to reclamation projects in those states (but not necessarily in the State from which the sales derived), *see* H.R. 14338, § 1, 56th Cong. (1901); (ii) "the Secretary of the Interior may, in his discretion, withdraw from public entry the lands required for reservoir or other irrigation works," *see id.* § 3; (iii) the federal government would construct and perpetually operate and maintain all reservoirs constructed pursuant to the act, but the irrigation works apart from the reservoirs would "pass as an appurtenance to the lands irrigated thereunder, to be maintained and operated by the owners of such lands at their own expense" once the federal government had been paid for the construction of those works, *id.* § 8; (iv) the Secretary of the Interior would be responsible to dispose of the lands pursuant to the Homestead Act, *see id.* § 5; and (v) the costs of the construction and maintenance of irrigation works would be borne by the entryman over a period

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[23] Alternatively, Representative Newlands and others also introduced bills proposing discrete reclamation projects or surveys. *See, e.g.*, H.R. 13847, 56th Cong. (1901) (bill introduced by Rep. Frank Wheeler Mondell of Wyoming proposing survey and report by Geological Survey of possibilities and cost of comprehensive water storage in arid western states and territories); H.R. 14072, 56th Cong. (1901) (bill introduced by Rep. Newlands proposing appropriations for specific reclamation projects in seventeen western states and territories).

of ten years after completion of the works, with "the right to the use of the water shall be perpetually appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right," *id.* Regarding the relationship of the proposed national reclamation project to state water law, the bill provided

> [t]hat nothing in this Act shall be construed as affecting or intended to affect or in any way interfere with the laws of any State relating to rights to water or its distribution for irrigation, and in the selection of locations for the construction of reservoirs or irrigation works under this Act, the Secretary of the Interior shall select localities where in his judgment the provisions of this Act can be carried into effect without any conflict or interference with the laws of any State relating to irrigation, *and the Secretary of the Interior may decline to let any contract for the construction of any proposed reservoir or irrigation works in any State until under the laws of such State the rights to the use of water from such reservoir or irrigation works in accordance with the provisions of this Act shall be assured under the laws of such State.*

Id. § 11 (emphasis added). Congress adjourned without a full debate on the bill.

In December 1901, President Theodore Roosevelt delivered his first annual message to Congress and appealed for coordinated national reclamation and irrigation, but included a somewhat mixed signal

regarding a federal reclamation scheme's relationship to state water law:

> There remain . . . vast areas of public land which can be made available for homestead settlement, but only by reservoirs and main-line canals impracticable for private enterprise. These irrigation works should be built by the National Government. The lands reclaimed by them should be reserved by the government for actual settlers, and the cost of construction should so far as possible be repaid by the land reclaimed. *The distribution of the water, the division of the streams among irrigators, should be left to the settlers themselves in conformity with State laws and without interference with those laws or with vested rights.* The policy of the National Government should be to aid irrigation in the several States and Territories in such manner as will enable the people in the local communities to help themselves, and as will stimulate needed reforms in the State laws and regulations governing irrigation.
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> . . . .
>
> Our aim should be not simply to reclaim the largest area of land and provide homes for the largest number of people, but to create for this new industry the best possible social and industrial conditions; and this requires that we not only understand the existing situation, but avail ourselves of the best experience of the time in the solution of its problems. A

> careful study should be made, both by the nation and the States, of the irrigation laws and conditions here and abroad. *Ultimately it will probably be necessary for the nation to co-operate with the several arid States in proportion as these States by their legislation and administration show themselves fit to receive it.*

Theodore Roosevelt, First Annual Message (Dec. 3, 1901), *in* STATE PAPERS AS GOVERNOR AND PRESIDENT 106, 108-09 (1925) (emphasis added).

Shortly after President Roosevelt's December 1901 address, "the Senators and Representatives from 13 States and 3 Territories, constituting the arid region, met together and appointed a committee of 17, regardless of party, to frame and present for their approval an irrigation measure." 35 CONG. REC. 6674 (1902) (statement of Rep. Newlands). Representative Newlands and Senator Henry C. Hansbrough of North Dakota simultaneously introduced a reclamation bill, modified in accordance with the President's remarks, in the House and Senate on January 21, 1902. *See* H.R. 9676, 57th Cong. (1902); S. 3057, 57th Cong. (1902).

The modifications contained in the reclamation bill introduced in January 1902, included an increase in the maximum amount of acreage available for purchase under the Act to 160 acres. *See* H.R. 9676, §§ 3, 5; S. 3057, §§ 3, 5. Other modifications included a provision that would pass "the management and operation of, but not the title to . . . irrigation works, excepting reservoirs and the works necessary for their

protection and operation" to the owners of the land irrigated thereby once repayment had been made to the federal government for construction of those works. H.R. 9676, § 6; S. 3057, § 6. Regarding the proposed federal reclamation scheme's relationship with state water law, the modified 1902 reclamation bill contained much stronger federal deference to state water law:

> [N]othing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, *but State and Territorial laws shall govern and control in the appropriation, use, and distribution of the waters rendered available by the works constructed under the provisions of this Act*: *Provided*, That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.

H.R. 9676, § 8 (emphasis added); S. 3057, § 8 (emphasis added).

As the 1902 reclamation bill wound its way through the legislative process, it sustained several minor amendments.[24] In early April 1902, President

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[24] For example, in February 1902, legislators added the requirement that entrymen irrigate "*at least one-half of the total area of his entry* for agricultural purposes." S. 3057, § 5 (ordered reprinted as agreed to in the Committee of the Whole, February 28, 1902).

Roosevelt met with various congressmen and advisors on the terms of the reclamation bill, including the wording of Section 8 of the bill and to what extent state water law should govern the appropriation, distribution, and use of water stored through federal reclamation projects under the proposed Act; as a result of that meeting, the phrase "but State and Territorial laws shall govern and control in the appropriation, use, and distribution of the waters rendered available by the works constructed under the provisions of this Act" was stricken and replaced with new language, so that the text of Section 8 of the proposed bill read:

> That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, *or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any land owner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof*; *Provided*, That the right to the use of the water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.

S. 3057, 57th Cong., § 8 (Reported with amendments, committed to the Committee of the Whole House on the state of the Union, April 7, 1902); *see also, e.g.*, Letter from J.A. Breckons to Sen. F.E. Warren (Apr. 3, 1902), Francis E. Warren Papers, Box 5, Folder 3, Am. Heritage Ctr., Univ. of Wyoming ("The conference was requested by [Rep. Frank W.] Mondell [of Wyoming], and at his suggestion the President invited [George] Maxwell and [Gifford] Pinchot to attend, inasmuch as they had been the strongest opponents here of the state control section of the irrigation bill. . . . [The President] then took up the irrigation bill, saying that he trusted the House Irrigation Committee would modify the state control section so that the measure could have the support of those who favored the general idea of irrigation, but were opposed to absolute state control. He intimated that he would favor such a bill, even though it should not meet the views and receive the indorsement [sic] of extremists.") (**DVD Doc. 1**). (With this report I have provided a DVD with historical material I examined and cited herein, and listed and described in the Index.) As reported in one magazine:

> The so-called state-control clause was modified by striking out the later portion of the section and making a substitution therefor, so that as the clause now stands it provides that nothing in the bill shall interfere with any state law relative to the appropriation, distribution, or use of water, and the Secretary of the Interior in carrying out the provisions of the act shall proceed in conformity with state laws; also that nothing in the

> bill shall be held to affect the rights of any state or states, or of the federal government, or of any individual in the waters of any interstate stream. The last provision simply leaves in operation the present rule of priority on the arid region.
>
> The members of the Irrigation Committee feel sure that the bill as reported will be satisfactory to all irrigation interests. The last clause of the state-control provision is inserted with the idea of fully meeting the views of all those living in states along the lower course of streams used for irrigation purposes.

News and Notes, *The Irrigation Bill*, FORESTRY AND IRRIGATION, Apr. 1902, at 141, https://books.google.com/books?id=ImwmAQAAMAAJ&pg=PA141&lpg=PA141&dq=Forestry+and+Irrigation+April+1902&source=bl&ots=d1MsmPlkkD&sig (last visited Jan. 6, 2017).[25]

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[25] On April 15, 1902, Benjamin Ide Wheeler, President of the University of California, and member of a state commission charged with drafting laws and rules for state water boards in California, wrote to President Roosevelt with his views on Section 8 of the proposed reclamation bill:

> I noticed some days ago an item in the newspapers which indicated your justifiable suspicion regarding the bearings of Section 8 of the Bill, – the section which, among other things, provides that "state and territorial laws shall govern and control in the appropriation," etc., "of the waters rendered available." I do not know precisely the range of your objection, but I can surmise that you think the section either goes too far or not far enough. This, I think, is true; but still the section, even as it stands, is, I believe, essential to the success of the measures proposed. Either the Federal Government

> must assume the entire charge of not only the storage, but the division and distribution of waters, and create anew the principles and methods and mechanism for such distribution, or it must require the States to pass laws providing for the administration of water supplies by State authorities, as is now done in Colorado, Wyoming, and Nebraska, and to some extent in Utah, Idaho, and Arizona; and it must furthermore insist upon action in the different States calculated to determine who now hold water rights and what their nature is. That the Federal Government should undertake the whole business is, I suppose, entirely out of the question. I think it would not be acceptable to the people of the West. I think also it would be too radical a measure altogether. What then remains, therefore, seems to me is for the Federal Government to commit the distribution, the use, etc., of the waters to the charge of State tribunals and laws, insisting that it will deal with only such as have established regular Commissions or Boards of Control which have determined what rights exist and are prepared to administer under those rights.

Letter from Benjamin Ide Wheeler, President, Univ. of Cal. to President Theodore Roosevelt 1-2 (Apr. 15, 1902), Theodore Roosevelt Papers, Library of Congress Manuscript Div., Theodore Roosevelt Digital Library, Dickinson State Univ., http://www.theodorerooseveltcenter.org/Research/Digital-Library/Record.aspx?libID=o37568. President Wheeler continued:

> The majority of the reservoirs to be built under the Act referred to will be located in the channels of running streams from which many ditches now divert water for irrigation. In some cases the water from the public reservoir can be best used for existing ditches, in others new ditches may be built, and in all cases the stored water will have to be turned in with the natural flow, and some authority will have to regulate the headgates of the ditches already built so as to prevent them from taking a part of the stored water, to which they are not entitled, – in other words, to insure that the

Another amendment to the bill occurring after the meeting with the President included the requirement that the Secretary of the Interior, when practicable, "*expend the major portion of the funds arising from the sale of public lands within each State and Territory hereinbefore named for the arid and semiarid lands within the limits of such State or Territory*," as well as the requirement that the sale of water pursuant to the Act be made only to "*actual bona fide resident[s] on*

> purchasers of water rights in the Government reservoir get what they have paid for. There is not a stream in California of any consequence for the case in hand where the distribution of stored water will not create conflicts with present holders of rights established under the State laws. If, therefore, the Federal Government should undertake to administer the distribution of the water it stores, it would come into inextricable conflict with the States. It is evidently impossible to divide the water of one and the same stream between Federal administration and State administration without enormously intensifying the present chaos regarding water rights. I should like, therefore, if Section 8 is amended to see it amended so as to insist upon State Boards of Control and determination of existing facts and rights in such States as expect to share the advantages offered by the Government.

Id. at 2.

President Roosevelt quickly responded to Wheeler: "I thank you cordially . . . for the very favorable information you give me about irrigation. . . . I believe you are right. . . ." Letter from President Theodore Roosevelt to Benjamin Ide Wheeler (Apr. 21, 1902), Theodore Roosevelt Papers, Library of Congress Manuscript Div., Theodore Roosevelt Digital Library, Dickinson State Univ., http://www.theodorerooseveltcenter.org/Research/Digital-Library/Record.aspx?libID=o182020.

such land, or occupant[s] thereof residing in the neighborhood of said land." S. 3057, §§ 5, 9 (Reported with amendments, committed to the Committee of the Whole House on the state of the Union, Apr. 7, 1902). The revised bill also included the provision that the Secretary of the Interior withdraw from public entry *all* lands required for a particular project (not only those needed specifically for dams, reservoirs, and canals) and that he do so prior to the start of construction of those works. *Id.* § 3.[26]

In June 1902, Congress enacted into law the April 1902 bill as the Newlands Reclamation Act; in so doing, Congress established the Reclamation Service within the Department of the Interior ("Reclamation") to oversee the concerted federal effort to alleviate the economic depression, drought, and population concerns in western states and territories at that time by allowing the government to undertake irrigation projects to establish family farms to relieve urban congestion. *See* Act of June 17, 1902, ch. 1092, 32 Stat. 388 (codified as

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[26] As reported by one newspaper:

> Another matter for modification is the portion regarding the withdrawal of lands from entry. It is desired that the bill shall be so carefully worded as to give the benefit of irrigation to bona fide settlers and prevent any opportunity at speculation. The interests of settlers are to be guarded most carefully.

At the White House, Conference on the Subject of Irrigation Today, THE EVENING STAR (Washington, D.C.), Apr. 2, 1902, at 1, http://chroniclingamerica.loc.gov/lccn/sn83045462/1902-04-02/ed-1/seq-1/ (last visited Jan. 6, 2017).

amended at 43 U.S.C. §§ 371-600e) [hereinafter 1902 Reclamation Act]. The 1902 Reclamation Act required

> [t]hat all moneys received from the sale and disposal of public lands in Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington, and Wyoming . . . [be] reserved, set aside, and appropriated . . . to be used in the examination and survey for and the construction and maintenance of irrigation works for the storage, diversion, and development of waters for the reclamation of arid and semiarid lands in the said States and Territories. . . .

Id. § 1. The 1902 Reclamation Act also limited distribution of water from its federal projects to landholdings and farms 160 acres or smaller, in order to create and serve new small family farms and avoid the creation of federally subsidized large farms in the West that would unfairly compete with smaller established farms in the East. *See id.* § 5. As Ethan A. Hitchcock, Secretary of the Interior, explained in 1905:

> Owing to the lavish disposal of the public lands during recent years there remains in the possession of the Government only a comparatively small amount of land which ultimately may be irrigated, most of the reclaimable land being in the hands of individuals or corporations. One of the wisest provisions of the reclamation act is that which states that "no right to the use of water for land in private ownership shall be sold for a

> tract exceeding 160 acres to any one landowner, and no such sale shall be made to any landowner unless he be an actual bona fide resident on such land, or an occupant thereof residing in the neighborhood." It is believed that judicious enforcement of this provision will bring about the cultivation of the reclaimed land in small holdings; thus indirectly many of the errors of the past in respect to profligate disposal of irrigable land may be partly remedied. It is obviously not the intent of the reclamation act to irrigate at public expense large private holdings and increase the wealth of a small number of men unless the public receives an equivalent gain. The strongest argument for the law is, not that it adds to the wealth of the State, but that it builds the greatest number of homes and creates a community of owners of the soil who live on the land and derive their sustenance from it.

ANN. RPT. OF THE SEC'Y OF THE INTERIOR 79-80 (1905), https://archive.org/stream/annualreportsof01unit#page/78/mode/2up (last visited Jan. 6, 2017). Reflecting in 1913 on the passage and implementation of the 1902 Reclamation Act, President Theodore Roosevelt stated:

> On June 17, 1902, the Reclamation Act was passed. It set aside the proceeds of the disposal of public lands for the purpose of reclaiming the waste areas of the arid West by irrigating lands otherwise worthless, and thus creating new homes upon the land. The money so appropriated was to be repaid to the

> Government by the settlers, and to be used again as a revolving fund continuously available for the work.
>
> The impatience of the Western people to see immediate results from the Reclamation Act was so great that red tape was disregarded, and the work was pushed forward at a rate previously unknown in Government affairs. . . .
>
> . . . .
>
> Every item of the whole great plan of Reclamation now in effect was undertaken between 1902 and 1906. By the spring of 1909 the work was an assured success, and the Government had become fully committed to its continuance.

THEODORE ROOSEVELT, AN AUTOBIOGRAPHY 396-97 (1913).

2. Congress establishes the Rio Grande Project operated by Reclamation

Shortly after its inception, Reclamation examined the merits of the International Boundary Commission's 1896 proposal for a reservoir and dam at El Paso. Reclamation took issue with the Commission's proposal:

> While the published report of the Commission and its engineers plainly sets forth the fact that increased irrigation in Colorado caused shortage of water in Mexico, Texas,

and New Mexico, the recommendations not only leave New Mexico out of all the benefits to be derived from a project inaugurated for the purpose of making up this shortage, but give part of her territory to Mexico; cover up another part of it by the proposed reservoir, and distinctly ask that the Government shall prevent the construction of any other large reservoir on the Rio Grande in the Territory of New Mexico. The only reasonable explanation of these recommendations lies in the probable fact that the Commission had no alternative plan for consideration, and thought that the plan recommended was the only possible means that could be adopted for restoring the water to which Mexico laid claim by virtue of ancient prior use. Indeed they were confronted at the time with the prospect of an Elephant Butte dam in New Mexico, not under Government management, but to be constructed, owned, and operated by a stock company of private capitalists, whose plans contemplated the construction of a comparatively low dam without sufficient storage capacity for irrigating a large area above and leaving a surplus for Mexico. Now that conditions have completely changed, and there is an alternative plan which it is claimed will accomplish just as much for Mexico and a great deal more for the United States, it becomes necessary to compare these two plans and choose between them.

1903-04 THIRD ANNUAL REPORT OF THE RECLAMATION SERVICE, at 397-98. In addition to citing the prohibitive costs of flooding "the many thousand acres of rich, high-priced, Mesilla Valley lands," and the required removal of railroad tracks occupying the land to be flooded, Reclamation noted that "[t]he El Paso reservoir would waste more water by evaporation and overflow each year than it would furnish for irrigation." *Id.* at 419. Further,

> [i]t would produce in the immediate vicinity of El Paso many thousands of acres of mud flats and marshes on land that would otherwise be exceedingly valuable for agricultural and other purposes. It would furnish no water for irrigating the great Mesilla Valley in New Mexico, a region as truly tributary to El Paso as El Paso Valley itself, although it would waste enough water by evaporation and overflow to irrigate 83,000 acres.

Id.

Considering several factors, Reclamation sought its own solution to cure the water deficits below El Paso:

> In considering these projects or any other plans of water storage on the Rio Grande it is well to keep in mind the following facts:
>
> (1) While the floods on the river are enormous, they do not come with any regularity, and the total flow in some years is less than one-tenth of the flow in other years.

> (2) Any reservoir constructed on the river will stop all the silt that comes down the river in suspension. Hence a small reservoir will accumulate as many acre-feet of mud per year as a large one until it is filled with mud.
>
> (3) All the water that comes down the river is needed for irrigation, and none should be wasted.
>
> These three conditions make it imperative that the reservoir should be as large and as deep as possible, and should have capacity for carrying a supply of water over from year to year to equalize the yearly inequalities, a surplus capacity for mud accumulations, and a surface for evaporation that is as small as possible in comparison with the quantity of water in storage.

Id. at 398. It identified a site at Engle, New Mexico, a short distance downstream from the site at Elephant Butte proposed earlier by the privately-owned Rio Grande Dam and Irrigation Company, which would allow Reclamation to take better advantage of the geography and expand the size of the dam and resulting reservoir. The Elephant Butte, as "a conical mountain peak rising abruptly from the river bank to a height of about 500 feet," provided the perfect geological structure at which "to build a dam that will form a reservoir 175 feet deep at its lower end and 40 miles long, with a storage capacity of 2,000,000 acre-feet, enough water to furnish 600,000 acre-feet per annum and irrigate 180,000 acres of land" in the following distributions: (i) 110,000 acres in New Mexico; (ii) 20,000 acres in

Texas above El Paso; and (iii) 50,000 acres in the El Paso valley below El Paso in Texas and Mexico. *Id.* at 398. As explained by Reclamation:

> [T]he Engle reservoir will waste no water by overflow and a minimum amount by evaporation, and at the same time will furnish enough water for irrigation to supply Mesilla Valley, give a flow to the old Mexican canal equal to that which was used from it years ago for irrigation, and have enough left over to allow Texas to participate in the benefits.
>
> The Engle dam has the final advantage of being in New Mexico and subject to the reclamation act.

Id. at 419.[27]

Frederick Haynes Newell, Reclamation's Chief Engineer, and Benjamin M. Hall, consulting engineer to Reclamation, presented their proposal to the Twelfth National Irrigation Congress at its meeting held in El Paso, Texas, in 1904. "Hall believed that support by the 1904 National Irrigation Congress for a dam at Elephant Butte and the Rio Grande Project would result in its formal authorization by the secretary of the interior, the passage of related federal legislation extending the Reclamation Act to the El Paso

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[27] Texas was not included in the original sixteen states and territories identified in the 1902 Reclamation Act, as it had earlier existed as a sovereign republic and possessed no U.S. federal lands to sell or underwrite the reclamation fund; therefore, Reclamation had no authority upon which to execute a reclamation project in the El Paso Valley.

Valley in Texas, and the ratification of a treaty with Mexico." LITTLEFIELD, *supra* note 11, at 105-06.

Reclamation's proposal for a federally funded dam and reservoir to be constructed at Engle/Elephant Butte was met with resounding approval. As conveyed by L. Bradford Prince, former New Mexico Governor and a delegate to the National Irrigation Congress:

> For a number of years there has existed a diversity of opinion – no, I rather may say a bitterness of action – between those living in the Rio Grande valley with regard to the irrigation improvements which seem necessary in order to utilize the water of that river. It was a three-cornered controversy – on the north, those living in the Territory of New Mexico; to the south and east of the river, those living in the State of Texas, and on the west of the river our brothers in the Republic of Mexico. Each had its own ideas, and each was sufficiently tenacious and sufficiently powerful to prevent action on the part of the other. Each, I am sorry to say, as time went by, became more and more antagonistic to the other, so that it seems as if harmony of action was almost among the impossibilities. But a miracle has come; that which seemed to be impossible is not only possible, but is an assured and accomplished fact. Harmony and unity of action have succeeded in the place where before was contention and bitterness. There have been frequent assurances during the course of the existence of this Congress, among all of those from all parts of the Rio

> Grande valley, north and central and south, and this has resulted in the adoption of a resolution which has been very aptly called "a most happy solution of a vexed question." This agreement was so perfect, that yesterday afternoon, at a meeting in this room, a resolution was adopted unanimously, by all who were present, asking that some course of action should prevail, and that the officers of the Reclamation Service should go on and do the great work which they had found it was possible to do. And since that time, in another conference, this statement, with an addendum explanatory to some extent, has been signed. I hold here the original; it has been signed by five representing New Mexico, five representing Texas and five representing the Republic of Mexico. The resolution which was adopted yesterday read: "*That we heartily approve the valuable work of the Reclamation Service under the Department of the Interior of Washington, whose officers of the Rio Grande have been in New Mexico and elsewhere, and we heartily endorse and approve the proposal of building the Elephant Butte dam as a happy solution of a vexed question that has embarrassed the parties interested, providing that an equitable distribution of the waters of the Rio Grande with due regard to the rights of New Mexico, Texas and Mexico.*"

THE OFFICIAL PROCEEDINGS OF THE TWELFTH NATIONAL IRRIGATION CONGRESS HELD AT EL PASO, TEXAS, NOV. 15-18, 1904, at 107 (Guy Elliott Mitchell, ed. 1905)

[hereinafter, 1904 PROCEEDINGS OF TWELFTH NATIONAL IRRIGATION CONGRESS] (emphasis added) (**DVD Doc. 2**).

The National Irrigation Congress sweepingly approved a resolution adopting Reclamation's proposal, notably including the acceptance that Reclamation would allocate the waters of the Rio Grande among New Mexico, Texas, and Mexico, not based upon the parties' historical usage or priorities, but based upon Reclamation's research and science. *Id.* at 107-09. In endorsing Reclamation's proposal, Mexican delegates suggested they would rely upon "surveys to be made by the engineers of the United States Reclamation Service to determine the number of acres upon the Mexican side of the Rio Grande which can be so irrigated." *Id.* at 108. The American delegates "heartily and unanimously endorse[d] the above statement and presentations, made by the honorable delegation representing the Mexican republic, and through them, the Mexican side of the Rio Grande valley. . . ." *Id.* As concluded by Governor Prince: "[N]ow that all obstacles are removed, now that all have agreed to accept the dictum of the authorities on the subject at Washington, and to work harmoniously in order that they may be brought to a practical conclusion, it is, as I say, a matter of great congratulations to all of us." *Id.* at 108-09.

In 1905, Congress established the Rio Grande Project, as envisioned by the resolution of the National Irrigation Congress adopting Reclamation's proposal, by ratifying an Act to allow the construction of a dam "near Engle, in the Territory of New Mexico, on the Rio

Grande, to store the flood waters of that river." Act of Feb. 25, 1905, ch. 798, 33 Stat. 814. The Act allowed Reclamation to proceed with the dam's construction "as part of the general system of irrigation," only after "ascertain[ing] [whether there be] sufficient land in New Mexico and in Texas which can be supplied with the stored water at a cost which shall render the project feasible and return to the reclamation fund the cost of the enterprise." *Id.* Congress appropriated no funds from the U.S. Treasury to build the reservoir and dam; rather, Reclamation was charged with identifying and surveying the irrigable lands in New Mexico and Texas to determine if the proceeds from the sale of public land in those States would feasibly pay for the project. *See id.*; *see also* 39 CONG. REC. 1904 (1905). In fact, Reclamation had already performed surveys of irrigable lands in New Mexico and Texas during 1903 and 1904, estimating that 180,000 acres of land to be irrigated in the following distributions, and, in effect, apportioning the waters of the Rio Grande in the Elephant Butte-Fort Quitman section of the Upper Rio Grande Basin: (i) 110,000 acres in New Mexico; (ii) 20,000 acres in Texas above El Paso; and (iii) 50,000 acres in the El Paso valley below El Paso in Texas and Mexico. *See* 1903-04 RECLAMATION SERVICE REPORT, at 398.

To satisfy the interstate aspect of the compromise reached at the 1904 National Irrigation Congress, the Act of February 25, 1905, also extended the Reclamation Act to include "the portion of Texas bordering upon the Rio Grande which can be irrigated" by the proposed

dam. Act of Feb. 25, 1905, ch. 798, 33 Stat. 814. Texas was not included in the original sixteen states and territories identified in the Reclamation Act, as it had entered the Union as a sovereign republic and had contributed no lands to the public domain, the sale of which could underwrite the 1902 Reclamation Act. According to one historian, the extension of the 1902 Reclamation Act to West Texas was of major import to the success of the Rio Grande Project:

> [W]ithout legislation allowing part of the Rio Grande Project to be built in the El Paso Valley, Reclamation Service officials realized that they would have to release waters for lands below El Paso into the riverbed at the southern boundary of New Mexico. This was a potentially wasteful procedure that conflicted with the prevailing sentiments that favored efficient natural resource management. Such a process also would cause a great deal of water to be lost to American farmers in Texas by what were essentially unregulated Mexican diversions along the Rio Grande.

LITTLEFIELD, *supra* note 11, at 114-15.[28]

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[28] In December 1905, President Theodore Roosevelt updated the country on the impact of the 1902 Reclamation Act, stating that "under that act the construction of great irrigation works has been proceeding rapidly and successfully, the lands reclaimed are eagerly taken up, and the prospect that the policy of national irrigation will accomplish all that was expected of it is bright," and adding his recommendation that the Act "should be extended to include the State of Texas." Theodore Roosevelt, Fifth Annual Message (Dec. 5, 1905), *in* STATE PAPERS AS GOVERNOR AND PRESIDENT 314 (1925). The following year, Congress extended the

In January 1906, pursuant to the 1902 Reclamation Act and in accordance with the laws of the Territory of New Mexico, Reclamation filed in the office of the Territorial Irrigation Engineer of New Mexico a notice of intent to utilize 730,000 acre-feet of water per annum from the Rio Grande for the Rio Grande Project:

> DEAR SIR: The United States Reclamation Service, acting under authority of an act of Congress known as the reclamation act, approved June 17, 1902 (32 Stat. 388), proposes to construct within the Territory of New Mexico certain irrigation works in connection with the so-called Rio Grande project. The operation of the works in question contemplates the diversion of water from the Rio Grande River.
>
> Section 22 of chapter 102 of the laws enacted in 1905 by the Thirty-sixth Legislative Assembly of the Territory of New Mexico, an act entitled "An act creating the office of Territorial irrigation engineer, to promote irrigation development and conserve the waters of New Mexico for the irrigation of lands, and for other purposes," approved March 16, 1905, reads as follows:
>
> > "Whenever the proper officers of the United States authorized by law to construct irrigation works shall notify the Territorial irrigation engineer that the

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Reclamation Act to include the entire state of Texas with the sixteen original Reclamation Act states. Act of June 12, 1906, ch. 3288, 34 Stat. 259.

United States intends to utilize certain specified waters, the waters so described and unappropriated at the date of such notice *shall not be subject to further appropriations under the laws of New Mexico*, and no adverse claims to the use of such waters, initiated subsequent to the date of such notice, shall be recognized under the laws of the Territory, except as to such amount of the water described in such notice as may be formally released in writing by an officer of the United States thereunto duly authorized."

In pursuance of the above statute of the Territory you are hereby notified that the United States intends to utilize the following-described waters, to wit:

A volume of water equivalent to 730,000 acre-feet per year, requiring a maximum diversion or storage of 2,000,000 miner's inches, said water to be diverted or stored from the Rio Grande River at a point described as follows:

Storage dam about 9 miles west of Engle, N. Mex., with capacity for 2,000,000 acre-feet, and diversion dams below in Palomas, Rincon, Mesilla, and El Paso Valleys, in New Mexico and Texas.

It is therefore requested that the waters above described *be withheld from further appropriation and that the rights and interests*

> *of the United States in the premises be otherwise protected as contemplated by the statute above cited.*

Letter from Benjamin M. Hall, Supervising Eng'r, U.S. Reclamation Serv., to David L. White, N.M. Territorial Irrigation Eng'r (Jan. 23, 1906), *reprinted in* 66 CONG. REC. 597 (1924) (emphasis added).

Two years later, Reclamation followed that notice with a notice of its intent to utilize "[a]ll the unappropriated water of the Rio Grande and its tributaries" for use in the Rio Grande Project:

> DEAR SIR: Claiming and reserving all rights under our former notice of January 23, 1906, addressed to David L. White, Territorial engineer of New Mexico, which said notice advised him of the intention of the United States to use the waters of the Rio Grande for the purpose of irrigation, and is now filed in your office, I do now hereby give you the following notice in addition to said former notice and supplemental thereto:
>
> The United States, acting under authority of an act of Congress, known as the reclamation act, approved June 17, 1902 (32 Stat. 388), proposes to construct within the Territory of New Mexico certain works in connection with the so-called Rio Grande project. The operation of the works in question contemplates the diversion of the water of the Rio Grande River.

Section 40 of chapter 49 of the laws enacted in 1907 by the Thirty-seventh Legislative Assembly of the Territory of New Mexico, an act entitled "An act to conserve and regulate the use and distribution of the waters of New Mexico; to create the office of Territorial engineer; to create a board of water commissioners, and for other purposes," approved March 19, 1907, reads as follows:

> "Whenever the proper officers of the United States authorized by law to construct works for utilization of waters within the Territory, shall notify the Territorial engineer that the United States intends to utilize certain specified waters, the waters so described, and unappropriated, and not covered by applications or affidavits duly filed or permits as required by law, at the date of such notice, shall not be subject to a further appropriation under the laws of the Territory of New Mexico for a period of three years from the date of said notice, within which time the proper officers of the United States shall file plans for the proposed work in the office of the Territorial engineer for his information, and no adverse claim to the use of the waters required in connection with such plans, initiated subsequent to the date of such notice, shall be recognized under the laws of the Territory, except as to such amount of water described in such notice as may be formally released in writing by an officer of

> the United States thereunto duly authorized: *Provided*, That in case of failure to file plans of the proposed work within three years, as herein required, the waters specified in the notice given by the United States to the Territorial engineer shall become public water, subject to general appropriations."
>
> In pursuance of the above statute of the Territory you are hereby notified that the United States intends to utilize the following-described waters, to wit:
>
> *All of the unappropriated water of the Rio Grande and its tributaries*, said water to be diverted or stored from the Rio Grande river at a point described as follows:
>
> Storage dam about 9 miles west of Engle, N. Mex., with capacity for 2,000,000 acre-feet, and diversion dams below in Palomas, Rincon, Mesilla, and El Paso valleys in New Mexico and Texas.
>
> It is therefore requested that the waters above described *be withheld from further appropriation and that the rights and interests of the United States in the premises be otherwise protected as contemplated by the statute above cited.*

Letter from Louis C. Hill, Supervising Eng'r, U.S. Reclamation Serv., to Vernon L. Sullivan, N.M. Territorial Eng'r (Apr. 8, 1908), *reprinted in* 66 CONG. REC. 597 (1924) (emphasis added).

3. Irrigation districts are established to guarantee the feasibility of the Rio Grande Project

To assess the feasibility of the Rio Grande Project, Reclamation solicited pledges of acreage from New Mexican and Texan farmers and businessmen to repay the costs of building the Rio Grande Project. By mid-1906, a formal agreement had been struck between Reclamation and two irrigation associations: the Elephant Butte Water Users' Association and the El Paso Valley Water Users' Association. *See* FISHER PAPERS REGARDING APPROPRIATION OF WATERS OF THE RIO GRANDE, H.R. DOC. 62-39, at 10-12 (transmitting June 27, 1906 Articles of Agreement as Exhibit B).

That agreement provided "[t]hat only those who are or who may become members of said associations, under the provisions of their articles of incorporation and by-laws, shall be accepted as applicants for rights to the use of water available by means of said proposed irrigation works." *Id.* at 10-11. In addition to providing the terms by which the irrigation associations would "guarantee the payments for that part of the cost of the irrigation works which shall be apportioned by the Secretary of the Interior to their shareholders," the agreement further provided

> [t]hat the aggregate amount of such rights to be issued shall in no event exceed the number of acres of land capable of irrigation by the total amount of water available for the purpose, being (1) the amount now appropriated by the shareholders of said associations

> and (2) the amount to be delivered from all sources in excess of the water now appropriated; and that *the Secretary of the Interior shall determine the number of acres so capable of such irrigation as aforesaid, his determination to be made upon due and expert consideration of all available data and to be based upon and measured and limited by the beneficial use of water*[; and]
>
> . . . .
>
> [t]hat in all the relations between the United States and these associations and the members of the associations, the rights of the members of the associations to the use of water where the same have vested, are to be defined, determined and enjoyed in accordance with the provisions of the said act of Congress and of other acts of Congress on the subject of the acquisition and enjoyment of the rights to use water; and also by the laws of New Mexico and Texas, where not inconsistent therewith, modified, if modified at all, by the provisions of the articles of incorporation and by-laws of said associations.

Id. at 11-12 (emphasis added).[29]

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[29] Eventually, a corporate transition from water user associations to water districts occurred:

> Despite Congress's reluctance to permit the Reclamation Service to enter contracts with irrigation districts, the district form remained very attractive. Districts could sell bonds and use the proceeds to repay the federal government *immediately* for the cost of construction. They seemed ideally suited to administer

> water projects in which the national government built dams and main canals and the district constructed the distribution and drainage systems. And while the Reclamation Service found it difficult to collect charges from uncultivated or dry-farmed land within its projects, irrigation districts had the power to tax *all* land within their boundaries, including urban real estate, whether the owners chose to irrigate or not.
>
> The irrigation district offered great advantages over water user associations, which prevailed on most of the projects. Water user associations were inherently "undemocratic." They operated on the principle of one acre, one vote, rather than one man, one vote, and they had little authority to discipline members. They were not collection agencies. Every water user had a separate contract and account with the government, which drove up the Reclamation Service's administrative and bookkeeping costs. When farmers refused to repay construction debt, the government filed suits against every farmer in arrears. Nor could water user associations compel project landowners who refused to apply for water rights to pay operation and maintenance charges. By transferring administrative responsibilities to local officials elected by the farmers themselves, it was hoped, much criticism could be diverted away from the Reclamation Service. The Warren Act, which permitted the Reclamation Service to sell surplus water stored in government reservoirs to landowners outside project boundaries, renewed interest in the irrigation district. In many parts of the West, farmers who worked land adjoining federal projects organized irrigation districts with the express purpose of purchasing water.

DONALD J. PISANI, WATER AND AMERICAN GOVERNMENT: THE RECLAMATION BUREAU, NATIONAL WATER POLICY, AND THE WEST 1902-35 at 133-34 (2002). Today, Elephant Butte Irrigation District is the successor water district to the Elephant Butte Water Users Association. *See* N.M. STAT. ANN. § 73-10-1. And El Paso County Water Improvement District No. 1 is the successor water district to the

With the lands of the El Paso Valley incorporated into the purview of the Reclamation Act and the feasibility of the Rio Grande Project confirmed by Reclamation, the interstate aspects of the Rio Grande Project appeared satisfied. Reclamation, however, had estimated that 50,000 acres in the El Paso valley below El Paso in Texas and Mexico could be irrigated through the construction of the reservoir and dam; therefore, Texas's apportionment depended heavily on a resolution by the United States of Mexico's claim to the waters of the Rio Grande.

4. An international convention settles Mexico's claim for damages due to alleged misappropriation of Rio Grande waters by U.S. citizens

The Act of February 25, 1905, reflecting the agreement reached at the 1904 National Irrigation Congress and establishing the Rio Grande Project, did not grant Reclamation authority to deliver any of the waters of the Rio Grande to Mexico. *See* Act of Feb. 25, 1905, ch. 798, 33 Stat. 814. As explained by Representative Stephens of Texas during statements just prior to the passage of the Act:

> I was a member of the irrigation congress at El Paso last November, and was present at the discussions when these agreements were

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El Paso Valley Water Users' Association. *See* EL PASO COUNTY WATER IMPROVEMENT DISTRICT #1, About Us, https://www.epcwid1.org/index.php/organization/about-us (last visited Jan. 6, 2017).

> made, and I wish to state that a full understanding was reached by all the parties at interest, and the dam as proposed in this bill was to be built in New Mexico, more than 100 miles above the line of Texas and old Mexico. . . .
>
> . . . .
>
> . . . The water impounded by this irrigation dam is not to be used in Mexico or turned over to Mexico unless there is, first, a treaty entered into between the United States and Mexico providing for an equitable division of the waters of the Rio Grande River, and providing that the claims of Mexico against the United States for the water Mexico has been deprived of shall be paid by furnishing Mexico with water from this reservoir. This bill does not admit that there is any such claim outstanding against the United States, but provides for determining this question; and we do not furnish Mexico with any water unless the treaty-making power of the United States and Mexico so stipulates.

39 CONG. REC. 1904 (1905).

The issue of Mexico's rights to an equitable apportionment of the Rio Grande had smoldered since the late 1880s. It was not until Texas, New Mexico, and Mexico reached a compromise at the 1904 National Irrigation Congress and the U.S. Congress subsequently green-lighted the Rio Grande Project that a convention between the United States and Mexico became tangible. The eventual realization of a treaty for the

international apportionment of the waters of the Rio Grande between the United States and Mexico depended upon the combined efforts of officials of Reclamation and the U.S. Department of State, Texas representatives and senators to Congress, and individual citizen activists; indeed, Texans participated fully, as they were well aware that the satisfaction of Mexico's claims would directly impact the water allocation Texas received.[30]

In May 1906, the two countries reached an agreement whereby, in exchange for Mexico's waiver of all of claims for damages, and "[a]fter the completion of the proposed storage dam near Engle, New Mexico, and the distributing system auxiliary thereto," the United States would deliver to Mexico, without cost, "a total of 60,000 acre-feet of water annually." Convention Between the United States and Mexico providing for the Equitable Distribution of the Waters of the Rio Grande for Irrigation Purposes, U.S.-Mex., arts. I, III & IV, 34 Stat. 2953, 2953-55 [hereinafter Convention of 1906].

D. The Completion and Operation of the Rio Grande Project

After an appropriation of $1 million by Congress in 1907, *see* Act of Mar. 4, 1907, ch. 2918, 34 Stat. 1357, construction of the Elephant Butte dam and reservoir

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[30] For a thorough discussion of the negotiations between U.S. and Mexican representatives, as well as the politics negotiated internally by the various American interests, *see* LITTLEFIELD, *supra* note 11, at 131-45.

began in 1911 and was completed in 1916, *see* RIO GRANDE JOINT INVESTIGATION, at 73.[31]

> Land owners on the Rio Grande Project represented by the Elephant Butte Irrigation District in New Mexico and the El Paso County Water Improvement District No. 1 in Texas

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[31] A system of drains was added by 1925. *See* RIO GRANDE JOINT INVESTIGATION, at 73. By 1936, the status of the Project was as follows:

> All old community ditches were taken over by the Project, reconstructed, enlarged, or extended, and incorporated as parts of the present system of more than 630 miles of main canals and laterals through which the waters released from Elephant Butte Reservoir are distributed. There are diversion dams and permanent diversion works at six points along the river. These are Percha Dam at the head of Rincon Valley, diverting to the Arrey canal; Leasburg Dam at the head of Mesilla Valley, diverting to the Leasburg canal; Mesilla Dam southwest of Las Cruces, diverting to the east side and west side canals; the International Diversion Dam opposite El Paso, diverting the Mexican Acequia Madre on the west side and to the Franklin canal on the east side; Riverside Heading about 15 miles below El Paso, diverting to the Riverside canal and Franklin feeder; and Tornillo Heading near the town of Fabens, diverting to the Tornillo canal. The drainage system of the Project is completed except for revisions and reconstruction occasioned by the river rectification programs of the International Boundary Commission and it comprises more than 450 miles of deep open drains.

Id. at 83-84. In 1936, Congress funded the construction of a second storage facility, Caballo Reservoir, a short distance below Elephant Butte Reservoir. *Id.* at 85. That reservoir was completed in 1938. *See* U.S. Dep't of the Interior, Bureau of Reclamation, Rio Grande Project Operations, http://www.usbr.gov/uc/albuq/rm/RGP/index.html (last visited Jan. 6, 2017).

> [had] contracted with the Government for full repayment of construction costs of the Project, except for the million dollars appropriated by the Congress to cover the cost of supplying water to Mexico under the terms of the treaty of 1906.

Id. at 73-74.

But until the late 1920s, the question of how waters from the dam and reservoir would be physically carried and dispersed to consumers downstream complicated many issues as construction and operation of the Rio Grande Project progressed, not the least of which was the remaining issue of the number and location of actual acres in New Mexico and Texas, respectively, that would be irrigated by the Project. With Mexico's allotment of water "fixed" by the Convention of 1906,[32] irrigators in both New Mexico and Texas had

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[32] In 1938, the National Resources Committee reported:

> The International Diversion Dam is owned by Mexico and was built to divert water into the Mexican canal. It is at this dam that delivery must be made to Mexico of 60,000 acre-feet annually under the terms of the treaty of 1906. The Bureau of Reclamation is responsible for this delivery, which must be accomplished largely through releases from Elephant Butte Reservoir, more than 125 miles upstream. The channel of the Rio Grande is thus used to carry water both for delivery to Mexico and for canals serving the Rio Grande Project. Below the Mexican Dam the river channel carries water to the Rio Grande Project canals heading below El Paso. In spite of its dual obligation to deliver water to Mexico and to the Rio Grande Project canals, the United States neither owns nor controls this carrying channel from Elephant Butte to the Mexican Dam.

an interest in seeing the maximum number of acres irrigated by the Project. By 1928, the actual number of acres irrigated by Reclamation through the administration of the Rio Grande Project was approximately 88,000 in New Mexico and 67,000 in Texas. *See id.* at 74-75.[33]

> Since quantities of water considerably in excess of 60,000 acre-feet must pass the Mexican Dam to supply Project canals below El Paso, and since the United States has no control over Mexican diversion to the Acequia Madre at the west end of the dam, which lies in Mexican territory, it has never been possible to deliver exactly 60,000 acre-feet to Mexico or to determine accurately the extent of the Mexican diversion. As a result of this situation, *it is indicated that the diversions by Mexico have exceeded the treaty specification by substantial amounts*. Moreover, there are other Mexican ditches heading on the river below Juarez and having no rights under the treaty, into which water is diverted if and when possible.

RIO GRANDE JOINT INVESTIGATION, at 84 (emphasis added).

[33] Irrigation of those acres included direct deliveries of water as well as return flows. *See id.* at 49. As explained by the National Resources Committee:

> In the main river valleys of the upper basin a supply of considerable magnitude is water which, once diverted for irrigation, returns to the stream as direct drainage or as inflow from the ground-water basin. This "return water" has its source (1) in losses from canals or other conduits during conveyance of water from points of diversion to points of use, (2) in surface drainage from the land after irrigation, and (3) in seepage to the underground basin. . . . Below the San Acacia diversion at the head of Socorro Valley the return flow is lost for use in the Middle Valley but passes on to the Elephant Butte Reservoir and ultimate use in the Elephant Butte-Fort Quitman section. In [that section] the

E. The 1929 Interim Rio Grande Compact

1. The Rio Grande Compact Commission is established to address the 1896 embargo still in force

After Mexico filed its formal claim for damages in October 1894 alleging misappropriation of Rio Grande waters, the Secretary of the Interior in response established an embargo in December 1896, suspending all development and further appropriation of Rio Grande waters on public land in Colorado and New Mexico indefinitely. *See* discussion *supra* Part III.B.4. In the two decades following the imposition of the 1896 embargo, landowners and irrigators, primarily from Colorado's San Luis Valley, "where the burden of the embargo [was] most keenly felt," registered complaints and protests concerning the continuance of the embargo. 66 CONG. REC. 591 (1924). Ottamar Hamele, special attorney for Reclamation, summed up the arguments in a report submitted to the House of Representatives:

> On the part of the complainants it has been urged (a) that the embargo is a restriction on the use of water and is in conflict

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return water of each subvalley becomes available to that next lower as far as the Tornillo heading of the Rio Grande Project. Below this, return water is available to the Hudspeth County Conservation and Reclamation District.

In estimating the water supply for the major units of the upper basin under given future conditions of irrigation development, the return water is an important consideration.

Id. at 47, 49.

> with the enabling act of March 3, 1875 (18 Stat. 474), under which Colorado was admitted to the Union; (b) that the right of way act of March 3, 1891 (26 Stat. 1095), makes a grant, and the Secretary of the Interior has no authority to withhold this grant, as demanded by the embargo; and (c) that diversions in Colorado will not adversely affect the Government project.
>
> On the other hand, the United States contends (a) that the enabling act of March 3, 1875, reserves to the Federal Government full authority over its public lands; (b) that the right of way act of March 3, 1891, gives the Secretary of the Interior a discretion to refuse to approve an application for a right of way when in his opinion it is contrary to the public interest to do so; and (c) that as a condition precedent to the approval of any application it must appear clear that the Government project will not be injured thereby.

Id.

Between 1896 and 1923, the Secretary of the Interior had modified the embargo, but nevertheless maintained it, severely limiting the grants of rights-of-way for irrigation purposes in the Upper Rio Grande Basin.[34] "Complaints against the embargo finally brought

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[34] *See* Letter from D.R. Francis, Sec'y of the Interior, to Comm'r of the Gen. Land Office (Jan. 13, 1897), *in* FISHER PAPERS REGARDING APPROPRIATION OF WATERS OF THE RIO GRANDE, H.R. DOC. 62-39, at 3 (1911) (modifying embargo to allow grants of rights-of-way for irrigation using the Pecos River because that tributary reaches the Rio Grande south of Juarez and, therefore,

would not impact the issues concerning the irrigable area at Juarez); Letter from E.A. Hitchcock, Sec'y of the Interior, to Comm'r of the Gen. Land Office (May 25, 1906), *in* FISHER PAPERS REGARDING APPROPRIATION OF WATERS OF THE RIO GRANDE, H.R. DOC. 62-39, at 3-4 (1911) (modifying embargo to allow approval of rights-of-way over public lands initiated by field surveys based upon notices of appropriation of water filed under laws of Colorado prior to March 1, 1903); Letter from Thomas Ryan, Acting Sec'y of the Interior, to Comm'r of the Gen. Land Office (July 10, 1906), *in* FISHER PAPERS REGARDING APPROPRIATION OF WATERS OF THE RIO GRANDE, H.R. DOC. 62-39, at 4 (1911) (modifying embargo to require all current and future applications for rights-of-way to be submitted "to the Director of the Geological Survey to ascertain whether they will conflict with the obligations of the United States, under the treaty with Mexico, recently ratified, or with the Rio Grande or any other project of the Reclamation Service"); Letter from Thomas Ryan, Acting Sec'y of the Interior, to Comm'r of the Gen. Land Office (Sept. 27, 1906), *in* FISHER PAPERS REGARDING APPROPRIATION OF WATERS OF THE RIO GRANDE, H.R. DOC. 62-39, at 4 (1911) (rescinding order of December 5, 1896 establishing embargo and all modifying orders but ordering that "before any applications involving the use of the waters [of the Rio Grande] in Colorado and New Mexico are submitted for final departmental action by [the General Land Office] they be first submitted to the Director of the Geological Survey to ascertain whether favorable action thereon would interfere with any project of the Reclamation Service or with the obligations of the United States under the treaty of May 21, 1906 with Mexico"); Letter from Frederick H. Newell, Dir., U.S. Reclamation Serv., to J.R. Garfield, Sec'y of the Interior (Apr. 25, 1907), *in* FISHER PAPERS REGARDING APPROPRIATION OF WATERS OF THE RIO GRANDE, H.R. DOC. 62-39, at 5-6 (1911) (requesting and receiving approval to modify embargo to approve applications for rights-of-way showing that parties' rights to irrigation were initiated prior to March 1, 1903 when the Reclamation Service began active operations for the Rio Grande Project and those requesting diversion of water less than 1000 acre-feet per annum); Letter from Arthur Powell Davis, Dir. U.S. Reclamation Serv., to Albert B. Fall, Sec'y of the Interior (Mar. 2, 1923), *in* 66 CONG. REC. 599, 600 (1924) (requesting and receiving approval to modify embargo to allow the Reclamation Service "to negotiate

forth the suggestion that a commission should be named to make a study of the water supply and draft a form of compact between the States affected under which an equitable allocation of the use of the waters of the Rio Grande would be made to each State." *Id.* That commission would become known as the Rio Grande Compact Commission.

New Mexico and Colorado both sanctioned compact negotiations by enacting laws authorizing the appointment of a representative on the Rio Grande Compact Commission. *See* Act of Mar. 12, 1923, ch. 112, 1923 N.M. Laws 175; Act of Mar. 20, 1923, ch. 192, 1923 Colo. Sess. Laws 702. In December of 1923, President Coolidge named Secretary of Commerce Herbert Hoover as the representative of the United States on the Rio Grande Commission. 66 CONG. REC. 591 (1924).[35]

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for the release of specific areas of public land for purposes of water storage under conditions that will best conserve and utilize the water resources and will protect vested rights in all parts of the Rio Grande Basin – such negotiations to be subject to the approval of the Secretary of the Interior, and, prior to such approval, to be subject to the scrutiny of all interested parties").

[35] The governors of New Mexico and Colorado requested federal representation on the Commission. Secretary of Commerce Herbert Hoover served on the Commission initially, but was replaced in 1928 by U.S. Assistant Attorney General William J. Donovan after Hoover resigned to fill the Office of the Presidency. When the Commission reconvened in 1934 to negotiate a permanent compact, President Franklin D. Roosevelt directed Sinclair O. Harper, Chief Engineer of the Bureau of Reclamation, to represent the federal government on the Commission. *See* Rio Grande River Compact Commission, Proceedings of the Rio Grande Compact Conference Held at Santa Fe, New Mexico, December 10-11,

The Rio Grande Compact Commission, including an unofficial Texas delegate, first met on October 26,

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1934, at 1, *in* Papers of Delph E. Carpenter and Family, Water Resources Archive, Colorado State University, Box 62, Folder 1, *available at* http://lib.colostate.edu/archives/findingaids/water/wdec.html#series7 (last visited Jan. 6, 2017). Mr. Harper summarized the role and scope of federal representation on the Commission:

> As I understand my duties I will act largely in the capacity of an observer and referee, or any other term you may call it, and I propose to represent the interests of the government only so far as they are affected by the Treaty with Mexico of 1906, and the investment which the government has in the Rio Grande project in New Mexico and Texas.

Id. The federal representative was not a voting member of the Commission. As discussed by the state representatives to the Commission and confirmed by Mr. Harper in 1934:

> SENATOR McGREGOR [of Texas]: To be sure we understand this, for instance if the three states agree on a compact, I don't think his (Harper's) negation would destroy that compact. I don't think he has a vote on it, in other words.
>
> MR. CARR [of Colorado]: I don't think so; he is presiding officer without vote.
>
> MR. HARPER: I think that can be answered by referring to the Compact of 1929 which the three Commissioners signed, and at one side it was approved by the representative of the government. Even though that were not the rule, as a matter of policy the representative of the government will act as Referee, for want of a better word, or umpire, and will only express his opinions when he considers the interests of the government, as represented by these two contacts which I just mentioned [the Rio Grande Project and the Convention of 1906], are affected.

Id. at 2.

1924, in Colorado Springs, Colorado, before any legislative act had been passed granting authority for a representative of Texas to sit on the Commission; indeed, anxiety existed as to Texas's participation in compact talks. Colorado's Act authorizing the appointment of a representative included specific reference to the option of Texas's participation on the Commission. *See* 1923 Colo. Sess. Laws at 702. But New Mexico's Act did not. *See* Transcript of First Meeting of Rio Grande River Compact Commission 11 (Oct. 26, 1924) (statement of Julian O. Seth of New Mexico), *available at* http://dspace.library.colostate.edu (search "Transcript of First Meeting of Rio Grande River Compact Commission") (last visited Jan. 6, 2017) ("The New Mexico act certainly omits Texas, presumably, I think, on the theory that all the area above Fort Quitman, which is scarcely entirely true, but on the theory nevertheless, that the Reclamation Service represented practically all of the area."). But New Mexico, as a general matter, was not opposed to Texas's participation, as its buy-in would be necessary if, ultimately, an adjustment of Texas's water allocation under the Rio Grande Project became necessary:

> In my district, the one warning I get from the water users, in going ahead with this procedure, is the possibility that our interests at sometime may be different from the interests of the El Paso Valley, and that unless we are very careful, that we proceed with the full acquiescence of the people in the lower valley, there may be questions of water supply which may at some time limit the project, and which

> might be interpreted by our friends below as being a limitation which would effect New Mexico's interest only. We have the City water supply of El Paso that may come up, and our people are a little bit doubtful of the propriety of going ahead unless Texas is fully and legally represented in every respect.

Id. at 18-19 (statements of Joseph Taylor of New Mexico).

Colorado, on the other hand, feared that Texas unfairly had the full support of Reclamation and would use that support to increase its water allotment if allowed to participate on the Commission:

> People of the San Luis Valley have been disturbed with the fear and apprehension that Texas would come forward and claim water for the irrigation of land near Brownsville [at the southernmost tip of Texas on the Rio Grande and border of Mexico], feeling that the burden of such a demand which they think would be unjust would naturally fall upon the source of supply, the major portion of which is in Colorado. . . . Frankly, this is the way they feel. For years and years they have sought by every method within their command, and especially in the years when they had the finances to proceed, to have a reasonable removal of what is known as the Embargo Act on Development. Those efforts have been futile. The Reclamation Service, as a matter of ample caution, has held firmly to this position. It has caused a feeling that the whole lower end of the river is against the upper, and that

> what New Mexico and Texas want to do is to strangle future developments in the upper country. Now, naturally that has put them in a frame of mind that they look with apprehension upon the coming in of Texas, for fear of the Brownsville demands. . . .

Id. at 24-25 (statements of Delph Carpenter of Colorado). Secretary Hoover provided comments on the political prudence of having Texas's participation:

> The people of the San Luis Valley are the ones who are most anxious to have the situation cleared up. Assuming that a compact was arrived at between New Mexico and Colorado, it must come before Congress, and with the opposition of the State of Texas, if they were not a party to it, it would stand but little chance of passing. It would be very seriously jeopardized.

Id. at 31. In the end, the members of the Rio Grande Compact Commission agreed that Texas's involvement in compact talks was required and they adjourned the business of the Commission until Texas passed an act authorizing the appointment of a representative to serve on the Commission. *Id.* at 35-36. Texas passed such an act to appoint a commissioner in 1925. *See* Act of Mar. 26, 1925, ch. 117, 1925 Tex. Gen. Laws 301.

2. The Secretary of the Interior lifts the 1896 embargo, causing compact negotiations to break down

In March 1923, Secretary of Interior Albert B. Fall somewhat loosened the grip that the 1896 embargo had upon the San Luis Valley by modifying the embargo to allow applications for grants of rights-of-way and canals for irrigation purposes to be considered by Reclamation on a case-by-case basis. *See supra* note 34. But Secretary Fall resigned later that month and Hubert Work of Colorado replaced him as Secretary of the Interior. On May 20, 1925, Secretary Work vacated the 1896 embargo order entirely. *See* RIO GRANDE JOINT INVESTIGATION, at 67; Delph E. Carpenter, *Rio Grande Water Controversy* 1 (1926), *in* Papers of Delph E. Carpenter and Family, Water Resources Archive, Colorado State University, Box 24, Folder 29 [hereinafter Carpenter, *Rio Grande Controversy Paper*], http://lib.colostate.edu/archives/findingaids/water/wdec.html#idp243680 (last visited Jan. 6, 2017).

That act, coupled with the Secretary of the Interior's approval of an application for a right-of-way to complete the Vega Sylvestre dam and reservoir in Colorado weeks earlier, prompted the immediate withdrawal of the delegate from New Mexico to the Rio Grande Compact Commission. *See* Carpenter, *Rio Grande Controversy Paper*, at 2. It appeared that New Mexico planned on litigating, rather than negotiating, its disputes regarding appropriation of Rio Grande waters in the San Luis and Middle sections of the Upper

Rio Grande Basin. As explained by Governor Hannett of New Mexico to Governor Morley of Colorado:

> I have heretofore made New Mexico's attitude plain to representatives of your state particularly Mr. Carpenter. The lifting of the embargo by Secretary Work and granting the right for construction of Vega Sylvester Dam and other permits in our judgment gravely threatens New Mexico's priorities in waters of Rio Grande. We cannot sit idly by negotiating while Colorado interests appropriate water. New Mexico will open up negotiations only on one condition and that is that the interests which have acquired Vega Sylvester permit first cancel and surrender whatever claim they have, all to be subject to terms of any compact entered into by the states. No one regrets proposed litigation more than myself but our rights must be reserved and respected.

Telegram from A.T. Hannett, Gov. of N.M., to Clarence J. Morley, Gov. of Colo. (Oct. 11, 1926), *reprinted in* Carpenter, *Rio Grande Controversy Paper*, at 3.

3. A temporary compact is negotiated

But as New Mexico prepared to litigate its Rio Grande claims, it and other states experienced significant legal challenges in ratifying and administering earlier interstate compacts – specifically the Colorado River Compact and the La Plata River Compact. *See*

LITTLEFIELD, *supra* note 11, at 188. "Moreover, disastrous flooding throughout the entire Mississippi River valley in 1927 had emphasized the need for concerted and unified responses to all of the nation's water resource problems." *Id.* Those events prompted New Mexico to return to the bargaining table, but only for the period of time remaining before its case was ready to be filed against Colorado. *Id.*

On December 19, 1928, the Rio Grande Compact Commission reconvened and signed a compact on February 12, 1929; that compact was approved shortly thereafter by the legislatures of the signatory States. *See* Act of May 22, 1929, ch. 9, 1929, Tex. Gen. Laws 29; Act of Apr. 9, 1929, ch. 154, 1929, Colo. Sess. Laws 548; Act of Mar. 9, 1929, ch. 42, 1929, N.M. Laws 61. The compact received Congressional approval in 1930. *See* Act of June 17, 1930, ch. 506, 46 Stat. 767 [hereinafter 1929 Interim Compact].

The 1929 Interim Compact, however, represented only a temporary agreement. As reported by the Commissioner from Colorado:

> The negotiations revealed that final apportionment of the waters of the Rio Grande between the signatory states should not be undertaken until after the conclusion of a concerted effort to obtain construction of a drain from the Closed Basin of the San Luis Valley and construction of a control reservoir at the head of the Rio Grande Canyon near the Colorado-New Mexico boundary.

Letter from Delph E. Carpenter, Comm'r, Rio Grande River Compact Comm'n, to William H. Adams, Gov. of Colorado 1-2 (Mar. 1, 1929), *in* Papers of Delph E. Carpenter and Family, Water Resources Archive, Colorado State University, Box 16, Folder 12 [hereinafter 1929 Carpenter Report], http://lib.colostate.edu/archives/findingaids/water/wdec.html#idp243680 (last visited Jan. 6, 2017) (reporting on substance of temporary compact). According to one historian,

> [New Mexico] recognized Colorado's desire to increase development in the San Luis Valley, but [it] thought this could be done by draining the waterlogged part of the valley commonly known as the "dead" or "sump" area and more formally designated the Closed Basin. Residents of the San Luis Valley had proposed utilizing this wasted water since as early as 1911, and the recovered water, [New Mexico] believed, could be used elsewhere in Colorado. Such a plan would allow Colorado to enlarge its irrigated acreage and expand its water supplies by as much as 200,000 acre-feet per year with no detrimental effects below the state line. [New Mexico] pointed out, however, that without such drainage, Vega Sylvestre Dam would be a direct threat to Rio Grande Project water rights because it would impound existing flows coming out of the San Luis Valley – an amount of water estimated by [New Mexico] to be about 600,000 acre-feet per year.

LITTLEFIELD, *supra* note 11, at 189 (internal footnotes and citations omitted).

Article II of the 1929 Compact acknowledged the United States' "paramount right and duty" to enter into treaties with foreign sovereigns, but firmly stated the signatory States' belief that the pledge of the Convention of 1906 of 60,000 acre-feet annually to Mexico imposed an unfair obligation on Colorado, New Mexico, and Texas specifically, and not upon all of the States of the Union equally. *See* 1929 Interim Compact, 46 Stat. 768-69.[36] The signatory States were concerned about that obligation; as part of its deliberations, the Commission heard testimony from engineering consultants from each of the signatory States, which confirmed their fear that significant volumes of Rio Grande water were wasted annually. As described by Delph E. Carpenter:

> The complaints of the [1890s] from the vicinity of El Paso gave rise to erroneous opinions respecting the water supply of the Rio Grande and led to a practice of assuming an inadequacy when, in fact, there is still a superabundance. Notwithstanding the construction of several reservoirs in Colorado since 1906, under the modified embargo order, and notwithstanding the irrigation of several thousand acres of newly reclaimed desert land in Texas by the Rio Grande Project and the over irrigation of the lands of that project,

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[36] "[W]hereby in order to fulfill that promise [of 60,000 acre-feet to Mexico annually] the United States of America, in effect, drew upon the States of Colorado, New Mexico, and Texas a draft worth to them many millions of dollars, and thereby there was cast upon them an obligation which should be borne by the Nation. . . ." 1929 Interim Compact, 46 Stat. 769.

> the uncontradicted evidence submitted to the Rio Grande Commission in the hearings preceding the concluding of the compact, proved that there is an average annual waste of more than 400,000 acre feet of water at the lower end of the Rio Grande Project, controlled by the Elephant Butte Reservoir, and that more than 200,000 acre feet of this is needlessly wasted. This project is the lowest on the river and reveals the net excess after satisfying all demands upon the river. It is freely admitted by representatives of the United States in charge of Elephant Butte Reservoir that there has been a large annual wastage of water because of lack of necessity for its use. These facts were first brought to light at the hearing before the Commission and had not been generally made known to the people of the three interested states.

1929 Carpenter Report, at 13-14. Therefore, the need to collect accurate data regarding water supply and river flows was of paramount importance to the Rio Grande Compact Commission, and would be required before any final apportionment agreement could be reached. But as a first step, the 1929 Interim Compact envisioned the Unites States' funding of a drain for the Closed Basin and a reservoir near the Colorado-New Mexico border in which to store the waters captured by the drainage works. 46 Stat. at 769.

Articles III, IV, and VI provided for temporary river regulation, which included the construction and use of stream-gauging stations along the Rio Grande;

information-sharing of the data from those stations; the establishment of a tri-state engineering committee, whose jurisdiction "shall extend only to the ascertainment of the flow of the river and to the prevention of waste of water"; and an agreement that Colorado and New Mexico may use in equal parts any spill from Elephant Butte Dam. *Id.* at 769-70.

Through Article VII, the drafters of the 1929 Interim Compact made clear they intended merely to preserve the status quo until 1935, when a final equitable apportionment would be determined after the Closed Basin drainage works and reservoir were completed and data had been collected regarding how much return flow the Closed Basin drain would provide. *Id.* at 771. As summarized by Delph Carpenter:

> Article VII provides that final equitable apportionment of the waters of the Rio Grande among said states is to be made by a compact to be negotiated by a Commission to be appointed not later than June 1, 1935. Such Commission shall equitably apportion the waters of the Rio Grande as of conditions obtaining on the river and within the Rio Grande Basin at the time of the signing of the present compact (February 12, 1929) and not as of conditions obtaining in 1935 and thereafter and no advantage or right shall accrue or be asserted by reason of construction of works, reclamation of land or other changes in conditions or in use of water during the time intervening between the signing of the present

> compact and the concluding of such subsequent compact to the end that the rights and equities of each state may be preserved unimpaired. . . .
>
> . . . .
>
> Authentic records of water supply and of river flow at different points will be imperative for the work of the future Commission, for a comprehensive knowledge of river conditions and for purposes of future allocation and administration. These records may be obtained only by the maintenance of stream gauging stations equipped with automatic recorders and by cooperation by the water officials of the three states.

1929 Carpenter Report, at 2-3, 6.[37]

So the "primary objective" of the 1929 Interim Compact was to procure federal funding for the building of the Closed Basin drain and reservoir "for the purpose of putting water in the river that is not perpetual, in order to give us a cushion upon which a fair adjustment could be made." Rio Grande River Compact Commission, Proceedings of the Rio Grande Compact

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[37] The 1929 Interim Compact carved out Colorado's "right to divert, store, and/or use water in additional amounts equivalent to the flow into the river from the drain from the Closed Basin," as the Commission recognized that the delivery of that water into the Rio Grande represented new water, not tributary water. *See* 1929 Compact, 46 Stat. 771. Delph Carpenter was clear in his report to the Colorado governor that "[t]h[e] [Closed Basin] proviso is a mandate to the future Commission." 1929 Carpenter Report, at 3.

Conference Held at Santa Fe, New Mexico, Dec. 10-11, 1934, at 6, *in* Papers of Delph E. Carpenter and Family, Water Resources Archive, Colorado State University, Box 62, Folder 1 [hereinafter 1934 Rio Grande Compact Comm'n Proceedings], *available at* http://lib.colostate.edu/archives/findingaids/water/wdec.html#series7. To preserve the signatory States' rights and equities until a final compact could be ratified down the road, Colorado agreed in Article V of the 1929 Interim Compact that, "until the construction of the Closed Basin Drain and . . . Reservoir," it would "not cause or suffer the water supply at the interstate gauging station to be impaired by new or increased diversions or storage within the limits of Colorado unless and until such depletion is offset by increase of drainage return." 1929 Interim Compact, 46 Stat. 770. New Mexico made similar guarantees in Article XII:

> New Mexico agrees with Texas, with the understanding that prior vested rights above and below Elephant Butte Reservoir shall never be impaired hereby, that she will not cause or suffer the water supply of the Elephant Butte Reservoir to be impaired by new or increased diversion or storage within the limits of New Mexico unless and until such depletion is offset by increase of drainage return.

Id. at 772. With "[e]ngineering studies lead[ing] to the conclusion that with completion of the proper works [*i.e.*, the Closed Basin drain and reservoir], the water supply [of the Rio Grande] is more than ample for all needs," *see* 1929 Carpenter Report, at 17, the States'

commitments to maintain the status quo until such time as a final compact could be ratified protected the apportionments of water made below Elephant Butte by Reclamation through administration of the Rio Grande Project.

In sum, the 1929 Interim Compact

> permanently provide[d] for the construction of the State Line Reservoir and the Closed Basin drain and permanently settle[d] the disposition of the waters of the drain and the relations and rights of those building and using the reservoir. Most of its other provisions [were] temporary but it set[] at rest a potential interstate controversy and provide[d] an orderly and constructive method for its future settlement.

Id. at 17-18.

F. The 1938 Rio Grande Compact

1. The Rio Grande Compact Commission reconvenes on the eve of the expiration of the 1929 Interim Compact

The stock market crash of 1929, occurring within months after the ratification of the 1929 Interim Compact, and the ensuing economic depression, halted the construction of the Closed Basin drain and reservoir until 1934. As the June 1935 deadline contained within the 1929 Interim Compact loomed, the Rio Grande Compact Commission reconvened on December 10, 1934, despite the fact that no drainage works had been

initiated and no data on availability and volume of return flow had been collected.[38]

Colorado pressed for a final, "perfect and regulated" apportionment of water and considered that determination to be the "main reason" for reconvening the Commission. 1934 Rio Grande Compact Comm'n Proceedings, at 16, 22. Colorado asserted that, pursuant to the 1929 Interim Compact, the Closed Basin drainage water was a Colorado asset existing outside of the waters of the Rio Grande, and, therefore, did not bear upon the equitable apportionment of those waters. *Id.* at 24. To that end, Colorado argued for "parity" with New Mexico and Texas, based upon "present requirements." *See id.* at 12-13, 24.

Texas, supported by New Mexico, strenuously objected to and viewed as premature Colorado's pursuit of a final, equitable apportionment of Rio Grande waters; Texas simply questioned: (i) whether Colorado planned to take advantage of the recent federal grant offered to it for the purpose of constructing the Closed Basin drain; and (ii) whether it wanted to extend the 1929 Interim Compact until such time as the drain and reservoir could be built and data regarding the volume of return drainage water from the Closed Basin could

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[38] By the time the Rio Grande Compact Commission reconvened in December 1934, "[t]he Public Works Administration ha[d] made an appropriation of $900,000 to construct a drain from the closed in basin in Colorado to the Rio Grande . . . commonly referred to as the sump area . . . , [which had to] be accepted or rejected soon." 1934 Rio Grande Compact Comm'n Proceedings, at 5.

be obtained. *See id.* at 23-33. As stated by Major Richard F. Burges of Texas:

> Our position is this: It is impossible to make an allocation of the waters of the Rio Grande until we know what waters there are. That cannot be known until the sump drain is constructed and its result manifested. That being true, we cannot conceive that we could, even if we wanted to, arrive at any permanent settlement of the matter. . . . Our second question was predicated upon this idea: If Colorado is going ahead with the drain – and we are constrained to believe it would be very unwise not to use that appropriation – then there should be such a temporary extension. You gentlemen all recall the compact expressly provides for that temporary extension as would permit the realization of that plan, and when that has been done we would then face the situation which we faced, as we thought five years ago, and that is, it would not be possible to arrive at a permanent allocation until we know what there is to allocate, and we cannot know that until this intermediate step is taken. That was the definite position of Colorado at that time, and it was ours, and I don't see that position has been changed, except we do know we can get that drain at federal cost. . . . [B]ut we cannot permanently allocate the waters of the Rio Grande until we know what they are, and we cannot know that until the drain is constructed and its return indicated.

Id. at 23-24. With that impasse, and even after a second round of meetings in January 1935, the Rio

Grande River Compact Commission adjourned, passing a resolution "recommending that the present Compact be extended for a period of two years, to June 1, 1937." *See* Rio Grande Compact Commission, Proceedings of the Rio Grande Compact Commission Held in Santa Fe, New Mexico, Dec. 2-3, 1935, at 1, *in* Rio Grande Compact Commission Records, 1924-41, 1970, Dolph Briscoe Center for American History, The University of Texas at Austin, Box 2F463 [hereinafter Dec. 1935 Rio Grande Compact Comm'n Proceedings] (**DVD Doc. 3**). The legislatures of all three states extended the 1929 Interim Compact for two years to June 1, 1937. *See* Act of Apr. 18, 1935, ch. 87, 1935 Tex. Gen. Laws 209; Act of Apr. 13, 1935, ch. 188, 1935 Colo. Sess. Laws 983; Act of Feb. 25, 1935, ch. 77, 1935 N.M. Laws 175. Congress approved that extension in June 1935. *See* Act of June 5, 1935, ch. 177, 49 Stat. 325.

2. The National Resources Committee is called upon to triage and assist in the resolution of the interstate water dispute in the Upper Rio Grande Basin

In part to deal with a lawsuit filed by Texas against New Mexico and the Middle Rio Grande Conservancy District in October 1935 over perceived misappropriation of Rio Grande waters, President Franklin Roosevelt assigned the National Resources Committee the task of cooperating with the three States represented by the Rio Grande Compact Commission "in gathering facts that might be helpful

in arriving at a solution of the interstate water problem on the Rio Grande above Fort Quitman." 1938 RIO GRANDE JOINT INVESTIGATION, at 10. Indeed, the federal government viewed itself as a party to the 1929 Interim Compact with "direct concern and weighty interest" in resolving any issue regarding the distribution of Rio Grande waters. Dec. 1935 Rio Grande Compact Comm'n Proceedings, at 5 ("[The federal government], no less than your three states, is a party to the existing Rio Grande Compact. . . .") (statement of Professor Harlan Barrows of the National Resources Committee) (**DVD Doc. 3**); *see also* Letter from President Franklin D. Roosevelt to Fed. Agencies Concerned With Projects or Allotments for Water Use in the Upper Rio Grande Valley Above El Paso (Sept. 23, 1935), *reprinted in* Dec. 1935 Rio Grande Compact Comm'n Proceedings, at 2 (referring to the federal government as a "party" to the 1929 Interim Compact).

Accepting the assistance of the National Resources Committee, the Rio Grande River Compact Commission resolved

> [t]hat the National Resources Committee, through the Water Resources Committee, be requested, in consultation with the members of the Rio Grande Compact Commission, to arrange immediately for such investigation (1) of the water resources of the Rio Grande Basin above Fort Quitman, (2) of the past, present and prospective uses and consumption of water in such Basin in the United States, and (3) of opportunities for conserving and augmenting such water resources by all feasible

> means, as will assist the Rio Grande Compact Commission in reaching a satisfactory basis for the equitable apportionment of the waters of the Rio Grande Basin in the United States above Fort Quitman, as contemplated by such Rio Grande Compact.

Dec. 1935 Rio Grande Compact Comm'n Proceedings, at 42 (**DVD Doc. 3**). But the cooperative investigation of the National Resources Committee was "limited to the collection, correlation and presentation of factual data, and shall not include recommendations, except upon request of the Rio Grande Compact Commission," and would be conducted "in harmony with the spirit and intent of the [1929 Interim] Rio Grande Compact." *Id.* at 43. "To accomplish th[e] investigation efficiently, expeditiously, and impartially within the period available," and with the approval of the Rio Grande Compact Commission, the National Resource Committee partnered with several federal agencies, including the USGS, the Bureau of Agricultural Engineering, and Reclamation. RIO GRANDE JOINT INVESTIGATION, at 11.

But the extension of the 1929 Interim Compact granted by the States' legislatures and Congress was due to expire on June 1, 1937, before the time the National Resources Committee's report would be completed. Moreover, the lawsuit filed by Texas against New Mexico and the Middle Rio Grande Conservancy District cast a shadow of uncertainty over the likelihood of a permanent compact being reached. Thomas

M. McClure, the Commissioner from New Mexico, convened a meeting of the Rio Grande Compact Commission in March 1937 to proffer New Mexico's position:

> It seems that [New Mexico's] position under the Compact has been changed a little bit since our last meeting in which the Compact was extended. Our idea of the compact was more or less status quo of conditions on the river; to hold in that condition until some permanent compact could be drawn up in which there could be equitable distribution of the waters. But, as I see it, the position of New Mexico is not that now, as we are in a law suit in the Supreme Court. Under the present compact it is questionable what effect that suit will have on New Mexico and at the present time it has not been definitely settled in New Mexico's mind what we should do about it.
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> . . . .
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> New Mexico has always been a compact state. We realize that it is the compact which in most cases prevents expensive and long drawn out litigation and we believe in compacts, and were well satisfied with the [1929] compact up until the time that we were sued on a more or less technicality in the provisions of the compact. . . .

Rio Grande Compact Commission, Proceedings of the Rio Grande Compact Commission Held in Santa Fe, New Mexico, Mar. 3-4, 1937, at 3, 6, *in* Rio Grande Compact Commission Records, 1924-41, 1970, Dolph

Briscoe Center for American History, The University of Texas at Austin, Box 2F463 [hereinafter Mar. 1937 Rio Grande Compact Comm'n Proceedings] (**DVD Doc. 4**). M.C. Hinderlider, the Commissioner for Colorado, conceded that "there is an element in [Colorado], particularly in the San Luis Valley, which is at this time lukewarm toward extending the life of the present Compact." *Id.* at 5. Ultimately, the Commissioners, in consultation with the Governors of their respective States, resolved to recommend to the legislatures and Congress to extend the 1929 Compact only to October 1, 1937, with the understanding that the rights of the parties to the litigation, particularly those of New Mexico, would not be impaired by the extension. *Id.* at 24. As explained by A.T. Hannett, attorney for the New Mexico Interstate Stream Commission:

> I think it is fruitless for us to discuss the extension beyond October 1st of this year. If we were to go before the Governor and tell him what the true situation is as to the pending litigation and this proposed extension and be frank with him as we must necessarily be, I am sure he would dispense with our services and you would have to deal with another lawyer and another engineer. I am convinced that the people of our state would not ratify an extension that would jeopardize our defenses in the pending litigation.

Id. at 22. Pursuant to the resolution of the Rio Grande Compact Commission, each State's legislature ratified an extension of the 1929 Interim Compact to October 1, 1937. *See* Act of Apr. 26, 1937, ch. 226, 1937 Tex. Gen.

Laws 440; Act of Apr. 19, 1937, ch. 228, 1937 Colo. Sess. Laws 1056; Act of Mar. 13, 1937, ch. 96, 1937 N.M. Laws 256.

In August 1937, the National Resources Committee completed its report entitled, *The Rio Grande Joint Investigation in the Upper Rio Grande Basin in Colorado, New Mexico, and Texas 1936-37*. *See* Letter from Frank Adams & Harlan H. Barrows, Rio Grande Joint Investigation, to Abel Wolman, Chairman, Water Resources Committee, National Resources Committee (Aug. 10, 1937), *in* RIO GRANDE JOINT INVESTIGATION (transmitting report). The Rio Grande Compact Commission reconvened in late September 1937 to review the *Rio Grande Joint Investigation*, despite the fact that the National Resources Committee had published the report late and, therefore, the report was not made readily available in its completed form for all Commission members prior to the meeting. *See* Rio Grande River Compact Commission, Proceedings of the Meeting of the Rio Grande Compact Commission Held in Santa Fe, New Mexico, Sept. 27 to Oct. 1, 1937, at 1, *in* Rio Grande Compact Commission Records, 1924-41, 1970, Dolph Briscoe Center for American History, The University of Texas at Austin, Box 2F463 [hereinafter Sept. 1937 Rio Grande Compact Comm'n Proceedings] (**DVD Doc. 5**).

Nevertheless, when the Commissioners reconvened to review the *Rio Grande Joint Investigation*, each State presented in writing "the views they entertain as to the minimum conditions under which [each State] would be willing to negotiate." *Id.* at 9. As to the

subject of a specific apportionment of water to Texas, Colorado appeared to import the "status quo" articulated in Article VII of the 1929 Interim Compact to the negotiations of the final compact: " . . . [A]nd that the Commission so named shall equitably apportion the waters of the Rio Grande as of conditions obtaining on the river and within the Rio Grande Basin at the time of the signing of the Compact." *Id.* at 10, 54. The "conditions obtaining on the river" at the signing of the 1929 Interim Compact included the operation of the Rio Grande Project and the allocation and distribution of water downstream of Elephant Butte Reservoir by Reclamation.

New Mexico's opening position also equated the apportionment owed to Texas with that allocated to the Rio Grande Project: "New Mexico is willing to negotiate with the State of Texas as to the right to the use of water claimed by citizens of Texas under the Elephant Butte Project on the basis of fixing a definite amount of water to which said project is entitled." *Id.* at 12, 59.

In one paragraph, Texas stated its position. Although Texas would have liked to have benefited from Colorado's and New Mexico's future reclamation projects, built to contribute more water into the Rio Grande, it nonetheless recognized and agreed that its allocation was tied directly to the amount released by the Rio Grande Project and negotiated for both the quantity and quality of that Project water:

> Although the State of Texas feels that it should share in the benefits from new works for the augmentation of the water supply of the Rio Grande, it will not insist thereon, provided that the States of Colorado and New Mexico will release and deliver at San Marcial a supply of water sufficient to assure the release annually from Elephant Butte Reservoir of 800,000 acre-feet of the same average quality as during the past ten years, or the equivalent of this quantity if the quality of the supply is altered by any developments upstream.

Id. at 13, 60.

With the position statements assuming that Texas's water allotment would be inextricable from the Rio Grande Project, each of the three States submitted proposed schedules for water deliveries. *See id.* at 61-65. Of particular concern to Colorado and New Mexico were unauthorized diversions taken by Mexico, above and beyond the volume of acre-feet owed to that Republic under the Convention of 1906, and which State(s) would bear the burden for those diversions. To account for those "over-diversions," Colorado proposed that "[t]he mean required releases from Rio Grande Project storage . . . be considered as 750,000 acre-feet per year," resulting in the burden for Mexico's unauthorized diversions shifting directly to the water districts under the Rio Grande Project. *Id.* at 32, 34.[39]

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[39] R.J. Tipton, consulting engineer to the Commission from Colorado, explained the bases for the proposal:

Although the *Rio Grande Joint Investigation* included massive amounts of new data and information, the members of the Rio Grande Compact Commission could not agree on terms for a permanent Compact "until further research is possible, [with] engineering suggestions for deliveries at the state line and San Marcial, and until the engineers have had an opportunity to check on [the] figures [provided in the *Rio Grande Joint Investigation*]." *Id.* at 52. Therefore, the Rio Grande Compact Commission resolved that one engineer consultant be appointed from each State and the federal government to form a committee

> for the purpose of discussing the engineering features, particularly of the state line deliveries and deliveries at San Marcial, in order to

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> [Colorado's proposal for annual Rio Grande Project releases] was worked out on two bases; the first being 800,000 acre-feet of releases from Elephant Butte, suggested the other day as a mean release over a period of years, and deducting from that all what appears to have been over-diversions by Mexico in an amount of some 74,000 acre-feet, as I remember, in 1930, up to 1935, and then adding an amount to that, 20 to 30,000 acre-feet, which brings it up around 750,000. Another basis was taking releases from Elephant Butte Reservoir since the signing of the former compact, eliminating the year of low release in 1935, since the operation was materially curtailed that year, but not including the last two years, that amounts to a mean of 783,000. That's eliminating the low releases of 1935, deducting 74,000 acre-feet of over-diversions and then bringing it back up to 750,000 by adding an additional amount.

Sept. 1937 Rio Grande Compact Comm'n Proceedings, at 34 (**DVD Doc. 5**).

> determine if they can arrive at a determination of general principles and if possible agree on the details of the deliveries, and the engineering factual data which should underlie the compact.

Id. at 53.[40] In the meantime, the parties agreed to stay the pending litigation in pursuit of a permanent compact based upon the forthcoming engineering report. *See* Letter from Charles Warren, Special Master, to Frank B. Clayton, Commissioner, Rio Grande Compact Commission (Dec. 21, 1937), *in* Rio Grande Compact Commission Records, 1924-41, 1970, Dolph Briscoe Center for American History, The University of Texas at Austin, Box 2F467 (informing Mr. Clayton of stay granted by Supreme Court) (**DVD Doc. 7**).

The engineering committee submitted its report to the Compact Commission "setting forth certain factual data bearing on the state line flow schedules" on December 27, 1937, and that report was circulated to the Commissioners. Rio Grande Compact Commission, Proceedings of the Rio Grande Compact Commission Held at Santa Fe, New Mexico, Mar. 3d to Mar. 18th,

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[40] The following engineers comprised the engineering committee: E.B. Debler, Hydraulic Engineer of the Bureau of Reclamation for the United States; Royce J. Tipton for Colorado; John H. Bliss for New Mexico; and Raymond A. Hill for Texas. *See* Letter from Comm. of Eng'g Advisors to Rio Grande Compact Comm'n 13 (Mar. 9, 1938) (transmitting second engineers' report), *in* Rio Grande Compact Commission Records, Dolph Briscoe Center for American History, The University of Texas at Austin, Box 2F466 (**DVD Doc. 6**).

incl. 1938, at 2, *in* Rio Grande Compact Commission Records, Dolph Briscoe Center for American History, The University of Texas at Austin, Box 2F463 [hereinafter Mar. 1938 Rio Grande Compact Comm'n Proceedings] (**DVD Doc. 8**). Thomas M. McClure, Commissioner for New Mexico, strongly objected to the engineers' report based, among other things, upon the volume of Rio Grande water the engineers' report allocated to Texas:

> I have discussed [the engineers' first report] with others in authority representing the State of New Mexico, and we have reached the conclusion that it would be a waste of time for the compact commissioners to meet and accept the report as a basis for negotiations of a new compact without clarification of the provisions of the report. It is too vague and indefinite in some respects; nor does it set up sufficient of the data used by the committee to work out the relationship of the flow at various stations; *likewise, the report fixes a basis for water supply to the State of Texas, which, in my judgment and in the judgment of others in authority in New Mexico, is so far out of reason that it could not be considered as a basis for negotiation.*
>
> Furthermore, the engineers in their recommendation plainly exceeded their authority. I understand that their authority was to present basic facts upon which the commissioners themselves might arrive at a permanent compact. It appears that, instead of

> reporting accurate basic data, a compromise on basic data was reported.

Letter from Thomas M. McClure, New Mexico State Eng'r and Comm'r, Rio Grande Compact Comm'n, to S.O. Harper, Chief Eng'r, Dep't of the Interior and Chairman, Rio Grande Compact Comm'n (Jan. 25, 1938), *in* Rio Grande Compact Commission Records, 1924-41, 1970, Dolph Briscoe Center for American History, The University of Texas at Austin, Box 2F466 (emphasis added) (**DVD Doc. 9**).

McClure believed that the engineers should "reassemble at the earliest possible moment and give the matter further study." *Id.* The other commissioners did not agree with McClure's recommendation. *See, e.g.*, Letter from M.C. Hinderlider, Colorado Comm'r to the Rio Grande Compact Comm'n, to S.O. Harper, Chief Eng'r, Dep't of the Interior and Chairman, Rio Grande Compact Comm'n (Feb. 4, 1938), *in* Rio Grande Compact Commission Records, 1924-41, 1970, Dolph Briscoe Center for American History, The University of Texas at Austin, Box 2F466 (**DVD Doc. 10**).[41] And for

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[41] Because both Texas's apportionment and part of New Mexico's apportionment (the Elephant Butte Irrigation District) of Rio Grande water was to be delivered via the Rio Grande Project, Texas appeared puzzled by New Mexico's objections to the volume of annual normal release by the Project proposed by the Engineer Advisors; Texas was disturbed by New Mexico's seeming unwillingness to advocate for the interests of its citizens in the Elephant Butte Irrigation District. *See* Letter from Raymond A. Hill to Frank B. Clayton (Feb. 8, 1938), *in* Rio Grande Compact Commission Records, 1924-41, 1970, Dolph Briscoe Center for American History, The University of Texas at Austin, Box 2F466 (**DVD Doc.**

11). Seeking to reduce New Mexico's discord regarding the schedule of deliveries to Texas proposed by the engineering consultants, the Texas delegation planned to request information on contemplated deliveries to the New Mexico-Texas state line, rather than to the Elephant Butte Reservoir (located in New Mexico) to encourage the New Mexico delegation to advocate for the Elephant Butte Irrigation District's interests in addition to those of water users in northern New Mexico:

> In your recent letter to Mr. Harper you alluded to the failure of McClure to consider the interest of Elephant Butte Irrigation District. I have been giving considerable thought to the implications of this situation and believe that the time has come when the State of Texas should cease being the direct representative of an irrigation district situated in New Mexico.
>
> So long as Texas bears the burden of protecting the rights of all lands under the Rio Grande Project, the official attitude of New Mexico is going to be the same as that of Middle Rio Grande Conservancy District. This was clearly brought out in the meetings of the Committee of Engineers when [John H.] Bliss [engineering advisor to the New Mexico Compact Commissioner] not only failed to assist me in discussions with [Royce J.] Tipton [engineering advisor to Colorado Compact Commissioner] but went so far as to make demands which favored Colorado beyond those that Tipton felt justified in making. The only conclusion from Bliss' attitude and from the expressions of McClure is that the use of water below Elephant Butte Dam should be reduced even if the benefit of such reduction would be solely Colorado's. If this attitude is continued into the Compact negotiations, and I see no reason to expect anything else, it will put Texas in an untenable position.
>
> I suggest, therefore, that you present the issue clearly to Judge [Edwin] Mechem [counsel for Elephant Butte Irrigation District] and [N.B.] Phillips [Manager of Elephant Butte Irrigation District]. I think that they, either directly or through political channels, should

> bring pressure on the State Engineer of New Mexico to protect their interests; also, that they should sit in on all conferences of New Mexico interests to the end that the Elephant Butte District may be given the same consideration by New Mexico that the Middle Rio Grande Conservancy District is given. If this is done, the Elephant Butte District can demand of McClure the schedule of deliveries into Elephant Butte Reservoir which will protect the Elephant Butte District. Texas can likewise demand the same schedule of deliveries in the Compact meetings as a protection to the lands in Texas.
>
> In order to accomplish the above and protect directly the interests of Texas land owners and indirectly the interests of all lands in the Rio Grande Project, I suggest that demand be made for the adoption of a schedule of deliveries at Courchesne [at the border of Texas and New Mexico]. . . .
>
> I realize that a similar suggestion was categorically rejected at a general conference just prior to the Compact Commission meeting in October. I believe, however, that the situation is sufficiently changed to warrant such a demand from Texas. In my judgment, the interests of the Elephant Butte Irrigation District will be better served thereby than will be the case if the full burden of providing for deliveries into Elephant Butte Reservoir is placed upon Texas.

Id.

Later in February 1938, the Elephant Butte Irrigation District and the El Paso County Water Improvement District No. 1 entered into an interdistrict agreement, approved by the Secretary of the Interior in April 1938, which affirmed Reclamation's prerogative under the Reclamation Act of 1902 to apportion waters of the Rio Grande Project and recognized Reclamation's determinations of maximum irrigable acreage between the two districts as a 88:67 ratio, respectively. *See* Contract Between Elephant Butte Irrigation District of New Mexico and El Paso County Water Improvement District No. 1 of Texas (Feb. 16, 1938), approved by Secretary of the Interior (Apr. 11, 1938), *in* Rio Grande

practical reasons, the federal representative and chair to the Rio Grande Compact Commission recommended that the Commission proceed to meet in March 1938 to ascertain what progress could be made toward a permanent compact. *See* Letter from S.O. Harper, Chief Eng'r, Dep't of the Interior and Chairman, Rio Grande Compact Comm'n, to M.C. Hinderlider, Thomas M. McClure, and Frank B. Clayton, at 2 (Feb. 12, 1938), *in* Rio Grande Compact Commission Records, 1924-41, 1970, Dolph Briscoe Center for American History, The University of Texas at Austin, Box 2F463 (**DVD Doc. 13**).

The Compact Commission reconvened in March 1938 to review the findings and recommendations. *See* Mar. 1938 Rio Grande Compact Comm'n Proceedings, at 2 (**DVD Doc. 8**). The New Mexico delegation remained dissatisfied with the engineers' first report, submitting nine complaints, including: (i) an objection to the figure of "800,000 acre feet of water annually" as the "normal release from the Elephant Butte," stating that amount "is far in excess of past and present average releases and is far in excess of their *project needs*"; and (ii) an insistence that "the responsibility of carrying out such treaty provisions [with Mexico] be definitely placed either with the state of Texas or with the United States." *Id.* at 11 (emphasis added).

New Mexico specifically took issue with the engineers' treatment of Mexico's unauthorized diversions

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Compact Commission Records, 1924-41, 1970, Dolph Briscoe Center for American History, The University of Texas at Austin, Box 2F466 (**DVD Doc. 12**).

as they affected the calculation of the "normal release" from the Elephant Butte Reservoir for Rio Grande Project deliveries – or, stated another way, for Texas's apportionment of the waters of the Rio Grande. *See id.* at 3. The engineers' report recommended that

> the normal release from Elephant Butte Reservoir be deemed to be 800,000 acre-feet per annum, adjusted for any gain or loss of usable water resulting from the operation of any reservoir below Elephant Butte. We also recommend that this normal release be reduced or increased by two-thirds of any change in aggregate diversions and loss to Mexico.

Raymond A. Hill, *Development of the Rio Grande Compact of 1938*, 14 NAT. RESOURCES J. 163, 182 (1974) [hereinafter Hill, *Development of the Rio Grande Compact*] (quoting Dec. 27, 1937 report of the Committee of Engineering Advisors). Those recommendations appeared to include in the calculation of the Rio Grande Project's "normal release" Mexico's allotment pursuant to the Convention of 1906 – but also its unauthorized over-diversions – and called for the three States to share *pro rata* any loss due to those unauthorized diversions below Elephant Butte.

Because New Mexico refused to negotiate specific apportionments of water until the engineers addressed its concerns, the Commission agreed to recess, without adjourning, while the engineers' committee considered those concerns, as "the paramount question for arriving at a decision upon this compact is the equitable division of the waters of the river." Mar. 1938 Rio Grande

Compact Comm'n Proceedings, at 14 (statement of M.C. Hinderlider) (**DVD Doc. 8**). The Commission recessed on March 7, 1938, reconvening on March 10, 1938, once the engineers had updated their report. *Id.* at 20; *see also* Letter from Comm. of Eng'g Advisors to Rio Grande Compact Comm'n (Mar. 9, 1938) (transmitting second report), *in* Rio Grande Compact Commission Records, Dolph Briscoe Center for American History, The University of Texas at Austin, Box 2F463 [hereinafter 1938 Engineers' Second Report] (**DVD Doc. 6**).

The 1938 Engineers' Second Report followed the format of the first report, including only the engineers' changed recommendations. The report outlined the engineers' processes in reaching the updated recommendations:

> We avoided discussion of the relative rights of water users in the three States, and were guided throughout our work by the general policy – expressed at the meeting of the Compact Commission in October – that present uses of water in each of the three States must be protected in the formulation of a Compact for administration of the Rio Grande above Fort Quitman, because the usable water supply is no more than sufficient to satisfy such needs.

1938 Engineers' Second Report, at 1. In fact, the engineers stated: "We are satisfied that no material expansion of the irrigated area in the Rio Grande Basin

above Fort Quitman will be practicable without importations from other watersheds." *Id.* at 12-13.

Notably, the report defined the following terms:

> Normal Release from Elephant Butte – is equal to an average of 790,000 acre feet per annum; provided that this amount shall be adjusted for any gain or loss in usable water resulting from the operation of any reservoir below Elephant Butte; provided, further, that water released from Elephant Butte reservoir for the generation of power which encroaches on flood control capacity of and which is not subsequently released from another reservoir for irrigation of the Rio Grande project lands plus deliveries to Mexico, shall be deemed to have been released for such purposes, excepting only when such release for power is made by an agency beyond the control of any of the States contrary to the formal protest of New Mexico or Texas or any irrigation district thereof.
>
> Project Storage – is the combined capacity of Elephant Butte Reservoir and all other reservoirs actually available for storage of usable water between Elephant Butte and Courchesne, but not more than a total of 2,638,860 acre feet.
>
> Usable Water – is all water in Project storage which is available for release in accordance with irrigation demands, including deliveries to Mexico.

> Unusable Spill – is the amount of water which is actually spilled from Elephant Butte Reservoir or released for flood control in excess of the current demand for irrigation of Rio Grande Project lands plus deliveries to Mexico and which is not stored in another reservoir for subsequent release for such uses; provided that, if the actual releases from Elephant Butte Reservoir from the time of previous unusable spill have aggregated more than the sum of the normal releases, the time of occurrence of spill shall be adjusted by the difference between the total actual release and the accrued normal release.

Id. at 8-9. "In the Second Report, the Engineer Advisors reduced the 'normal release' to 790,000 acre-feet, which included the 60,000 acre-foot treaty obligation." William A. Paddock, *The Rio Grande Compact of 1938*, 5 U. DENVER WATER L. REV. 1, 32 (2001). "In addition, they eliminated from the definition of 'normal release from Elephant Butte' any provision for sharing either in the benefit of Mexico's reduced over-diversions or in the burden of increased deliveries to Mexico." *Id.*

As the engineers had sufficiently addressed all of the Compact Committee's concerns and questions, the Rio Grande Compact Commission adopted the recommendations of the 1938 Engineers' Second Report, including the proposed schedule of deliveries to be made by Colorado and New Mexico, and passed a motion that allowed for a "drafting committee consist[ing] of two attorneys designated by each commissioner and that the committee would actually make a preliminary

draft of the compact for final submission after it is discussed by all of the states and the respective commissioners of the states." Mar. 1938 Rio Grande Compact Comm'n Proceedings, at 31 (**DVD Doc. 8**). The draft compact would "incorporate in substance the report of the engineers and provide administrative machinery. . . ." *Id.* The advisors appointed by the Commissioners included: for Colorado, George M. Corlett, counsel for the Rio Grande Water Users' Association, and Ralph Carr, counsel for the Conejos River Water Users' Association; for New Mexico, A.T. Hannett, Special Assistant Attorney General and counsel for the Interstate Streams Commission of New Mexico, and Fred E. Wilson, counsel for the Middle Rio Grande Conservancy District; and for Texas, Major Richard F. Burges, counsel for the El Paso County Water Improvement District No. 1, and Judge Edwin Mechem, Sr., counsel for the Elephant Butte Irrigation District. *See id.*[42] The

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[42] At first glance, it may appear odd that Texas would appoint a legal advisor from New Mexico to represent Texas's interests in negotiating and crafting the 1938 Compact. But, as explained later in 1938 by Rio Grande Compact Commissioner Frank B. Clayton of Texas to lower Rio Grande water users, the interests of Texas above Fort Quitman (*i.e.*, the El Paso County Water Improvement District No. 1) were completely aligned with Elephant Butte Irrigation District of New Mexico as beneficiaries of the Rio Grande Project:

> [I]f, in those negotiations, we had permitted the conflicting interests in each State to attempt to insert in the compact provisions protecting their own particular requirements, no compact could ever have been arrived at. There is as much controversy in Colorado as in Texas, maybe more, and fully as much in New Mexico as here. You gentlemen know that as far as the Rio

United States did not appoint a legal advisor to the drafting committee, as the only legal advisor to the United States present at the start of the proceedings had a scheduling conflict and was unavailable to meet with the drafting committee. *Id.* at 31-32.

3. A final compact apportioning Rio Grande waters is signed

On March 18, 1938, the Commissioners of the Rio Grande Compact Commission signed a final compact that equitably apportioned the waters of the Rio Grande above Fort Quitman among Colorado, New Mexico, and Texas. The 1938 Compact contains a preamble and seventeen articles, many of which directly

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> Grande project is concerned, the interests of the Elephant Butte District, in New Mexico, and the districts in Texas above Fort Quitman are common interests. We have with us the manager and attorney of the Elephant Butte district, in New Mexico, and because our interests are common we determined long ago that no satisfactory, practical, legal or engineering way could be devised by which the waters could be allocated between these districts at the Texas line. As far as they and we are concerned, our source is the same. If the supply is impaired above Elephant Butte, we all suffer alike. Consequently, from both the legal and practical standpoint there is an identity of interests.

Proceedings of Meeting Held on Friday, May 27, 1938 at El Paso, Texas Between Representatives of Lower Rio Grande Water Users and Representatives of Irrigation Districts Under the Rio Grande Project of the Bureau of Reclamation 11, *in* Rio Grande Compact Commission Records, Dolph Briscoe Center for American History, The University of Texas at Austin, Box 2F463 (**DVD Doc. 14**).

imported the text and tenets of the 1929 Interim Compact. As explained by Raymond A. Hill, Engineering Advisor to the Rio Grande Commission from Texas:

> Although the several schedules of deliveries set forth in Rio Grande Compact were of primary concern to the Rio Grande Compact Commissioners in effecting an equitable apportionment of the waters of the Rio Grande above Fort Quitman, the Compact contains many other provisions of importance, some having to do with administration, others defining special rights of separate States, and others placing limitations upon the separate States.
>
> It is significant that the Committee of Legal Advisers to the Commissioners followed the language of the 1929 Compact insofar as they could do so in preparing the drafts of the 1938 Compact. The preamble is much the same; many of the definitions in Article I are the same; Article XV and Article XVI of the 1938 Compact are almost verbatim copies of Articles XIII and IX, respectively, of the 1929 Compact.

Hill, *Development of the Rio Grande Compact*, at 184.

The preamble designates the purpose of the 1938 Compact:

> The State of Colorado, the State of New Mexico, and the State of Texas, desiring to remove all causes of present and future controversy among these States and between citizens of one of these States and citizens of

> another State with respect to the use of the waters of the Rio Grande above Fort Quitman, Texas, and being moved by considerations of interstate comity, and for the purpose of effecting an equitable apportionment of such waters, have resolved to conclude a Compact for the attainment of these purposes. . . .

Act of May 31, 1939, ch. 155, 53 Stat. 785. Article I contains definitions of specific terms used in the 1938 Compact. Of note are the following definitions:

> "Project Storage" is the combined capacity of Elephant Butte Reservoir and all other reservoirs actually available for the storage of usable water below Elephant Butte and above the first diversion to lands of the Rio Grande Project, but not more than a total of 2,638,860 acre-feet.
>
> "Usable Water" is all water, exclusive of credit water, which is in project storage and which is available for release in accordance with irrigation demands, including deliveries to Mexico.
>
> "Credit Water" is that amount of water in project storage which is equal to the accrued credit of Colorado, or New Mexico, or both.
>
> . . . .
>
> "Actual Release" is the amount of usable water released in any calendar year from the lowest reservoir comprising project storage.
>
> "Actual Spill" is all water which is actually spilled from Elephant Butte Reservoir, or

> is released therefrom for flood control, in excess of the current demand on project storage and which does not become usable water by storage in another reservoir; provided, that actual spill of usable water cannot occur until all credit water shall have been spilled.

Id. at 786.

Article II identifies twelve locations for stream-gauging stations maintained and operated by the Rio Grande Compact Commission itself or in cooperation with the appropriate government agency and requires that similar stream-gauging systems be constructed and maintained in the future for any reservoir completed after 1929. *Id.* at 786-87.

Article III identifies "[t]he obligation of Colorado to deliver water in the Rio Grande at the Colorado-New Mexico State Line" in an amount determined by schedules that correspond to water quantities at gauging stations on both the Rio Grande and the Conejos River. *Id.* at 787-88. As clarified by M.C. Hinderlider, Colorado's State Engineer and Rio Grande Compact Commissioner:

> Article III sets up the schedules of relationship between the total water supply furnished by the Conejos and its tributaries, and the outflow to the Rio Grande, and also the relationship between the total water supply furnished by the Rio Grande at Del Norte and outflow at the stateline, less contributions from the Conejos River basin, as determined by conditions of inflow and outflow since 1928

> (the former temporary compact provided that the conditions on the river should remain as of 1929), and makes provisions for correcting this relationship between inflow and outflow resulting from new depletions of inflow, or increase of inflow resulting from importation of water from the Colorado River basin.
>
> While the obligation to meet the schedule of stateline deliveries rests upon the San Luis Valley as a whole, it is believed that a division of the obligation as between the Conejos and Rio Grande will better enable the water users to apportion among themselves their relative responsibilities in meeting the total obligations of Colorado.

M.C. HINDERLIDER, RIO GRANDE BASIN COMPACT 23 (1938) [hereinafter HINDERLIDER, RIO GRANDE BASIN COMPACT], *in* Papers of Delph E. Carpenter and Family, Water Resources Archive, Colorado State University, Box 62, Folder 5, http://lib.colostate.edu/archives/findingaids/water/wdec.html#idp243680 (**DVD Doc. 15**).

Article IV requires "New Mexico to deliver water in the Rio Grande at San Marcial," a gauging station in New Mexico upstream of Elephant Butte Reservoir, for nine months of each year. 53 Stat. at 788.[43] "Article

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[43] In 1948, the Rio Grande Compact Commission adopted a resolution amending the 1938 Compact that changed the location of New Mexico's deliveries – without altering the obligation to deliver water; the resolution abandoned the gauging stations at San Acacia and San Marcial and, instead, required "New Mexico to deliver water in the Rio Grande into Elephant Butte Reservoir" year-round. Rio Grande Compact Comm'n, Tenth Annual Report of the Rio Grande Compact Commission 3 (1948), http://www.

IV sets up the schedules of relationship between the total water supply furnished by the Rio Grande at Otowi, New Mexico, which is located 78 miles south of the Colorado-New Mexico stateline, and that furnished at San Marcial near the upper end of Elephant Butte Reservoir. . . ." HINDERLIDER, RIO GRANDE BASIN COMPACT, at 24. Essentially, New Mexico is required to deliver to the Elephant Butte Reservoir a designated percentage of the water flowing past Otowi.

Article V grants the Rio Grande Compact Commission the right to abandon or create gauging stations with unanimous consent. 53 Stat. at 789; *see also* Hill, *Development of the Rio Grande Compact*, at 184. Article VI creates a system of credits and debits for Colorado and New Mexico, corresponding respectively to over-deliveries and under-deliveries of water. 53 Stat. at 789. Article VI also imposes caps on the debits and credits each State can accrue and requires that each State "retain water in storage at all times to the extent of its accrued debit." *Id.* As "credit water" is that volume of water delivered annually in excess of that required under the 1938 Compact, "credit water" is within the exclusive control of the over-delivering State; however,

> [Article VI] also provides that Colorado or New Mexico may not accumulate annual credits in Elephant Butte reservoir in excess of 150,000 acre-feet of water. This limitation is

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ose.state.nm.us/Compacts/RioGrande/isc_rio_grande_tech_compact_reports.php (selecting 1948 report).

> designed to prevent unsound expansion of development which otherwise might result from accumulations of large annual credits, and which also might reduce the available capacity of that reservoir to regulate the portion of the river flow to which the lands under the Elephant Butte are rightfully entitled.

HINDERLIDER, RIO GRANDE BASIN COMPACT, at 24.

Article VII prohibits Colorado and New Mexico from "increas[ing] the amount of water in storage in reservoirs constructed after 1929 whenever there is less than 400,000 acre feet of usable water in project storage," unless actual releases from the Rio Grande Project "have aggregated more than an average of 790,000 acre feet per annum." 53 Stat. at 790.

Article VIII provides "that if the usable water in Elephant Butte and Caballo Reservoirs is less than 600,000 acre feet during any January, both Colorado and New Mexico shall release enough debit water from storage reservoirs to maintain at least 600,000 acre feet in the lower reservoirs until the end of April"; but "[t]he amount released by each is limited by the total accrued debit of each." Letter from Raymond A. Hill, Engineering Advisor to the Rio Grande Compact Comm'n, to Julian P. Harrison, Esq., Rio Grande Compact Comm'r for the State of Tex., at 1 (Dec. 8, 1940), *in* Raymond A. Hill Papers, 1890-1945, Dolph Briscoe Center for American History, The University of Texas at Austin, Box 4X190 (**DVD Doc. 16**); *see also* 53 Stat. at 790. As explained by M.C. Hinderlider to Colorado Governor Teller Ammons in 1938:

> This provision is to prevent shortage under the Elephant Butte Reservoir due to the withholding of water which would otherwise have been in storage in that reservoir. The terms of the provisions are such that the release of the water can be made at a rate to protect structures and property along the Conejos and Rio Grande against high stages of flow, and to insure that the releases of reservoir water may be made in such manner as not to encroach upon the stream channel capacity to the detriment of the use of such capacity by Colorado appropriators.

HINDERLIDER, RIO GRANDE BASIN COMPACT, at 25 (**DVD Doc. 15**). And Raymond Hill later explained:

> It is apparent . . . that the Rio Grande Compact Commissioners, at the time of executing the Rio Grande Compact of 1938, anticipated that compliance by Colorado with the schedules of deliveries set forth in Article III of that Compact and compliance by New Mexico with the schedules set forth in Article IV would result in enough water entering Elephant Butte Reservoir to sustain an average normal release of 790,000 acre-feet per year from Project Storage for use on lands in New Mexico downstream of Elephant Butte Reservoir and on lands in Texas and also to comply with the obligations of the Treaty of 1906 for deliveries of water to Mexico. It is also clear that the restrictive provisions [of Article VIII] were designed to protect Colorado and New Mexico from the adverse effects of releases

> from Project Storage at any greater average annual rate.

Hill, *Development of the Rio Grande Compact*, at 183-84. Article VIII, therefore, shielded Colorado and New Mexico from bearing responsibility for any unauthorized diversions by Mexico downstream of Elephant Butte, which had been a major source of contention for New Mexico.

Article IX of the 1938 Compact, which allows for future works on the San Juan River to divert water into the Rio Grande, *see* 53 Stat. at 790, "is a recognition of the right of the U.S. Government or New Mexico to make importations of water into the Upper Rio Grande Basin under conditions that will insure the protection of vested rights, present and future uses of water, and full development in the San Juan Basin in Colorado." HINDERLIDER, RIO GRANDE BASIN COMPACT, at 25. Article X states that, should water from another drainage basin be introduced pursuant to Article IX into the Rio Grande Basin by the United States or Colorado or New Mexico, individually or jointly, then "the State having the right to the use of such water shall be given proper credit therefor in the application of the [delivery] schedules." 53 Stat. 790.

Article XI protects the character and quality – not the quantity – of the water in the Rio Grande flowing downstream and allows a signatory State to bring an action related to such in the Supreme Court if that State decides a negative change in the quality of the

waters has occurred. *Id.* at 790-91. M.C. Hinderlider elaborated on the inclusion of Article XI:

> Article XI is a most important declaration of principle with respect to the responsibility of an upper state, or citizen thereof, for the quality or character of the water flowing from an upper state into another state, and is designed for the protection of the interests of the upper state and its water users.

HINDERLIDER, RIO GRANDE BASIN COMPACT, at 26. And, as explained by Frank B. Clayton, when asked whether the 1938 Compact addressed the quality of the water passing downstream:

> That question was a very sore spot, and almost prevented the consummation of the compact. One of the principal issues in the suit with New Mexico was the impairment on her part of the quality of the water by development of the Middle Rio Grande Conservancy District and for that reason [Texas was] not getting the equivalent of what we were entitled to in undiluted, unimpaired water. That point was discussed at great length in the negotiations for the compact. We tried to get a definite agreement from Colorado and New Mexico that if the quality of the water was impaired beyond a certain grade or point, defining it in terms of total dissolved salts, instead of in terms of general quality, then the amount would be increased according to the proportions worked out by the engineers. We could not agree on that point. There has never been any determination by the courts of the legal

> effects of changing the quality of water by irrigation, as far as the rights of users below are concerned. We did insert in the compact a provision substantially to the effect that the compact was without prejudice to the rights of Texas, or of any of the signatory States, to invoke the jurisdiction of a court of competent jurisdiction in the event the quality of the water is impaired. That provision is Article XI of the Compact. . . .
>
> That, gentlemen, was a compromise between opposing views. They took the position that they were not in law responsible. We took the contrary position, not only in the negotiations for the compact but in the lawsuit. But we could not reach any definite agreement as to the legal effect nor as to the relation between salinity and amount. Consequently, we left that point open, to be determined by litigation in the event the quality should be impaired in the future to our detriment.

May 1938 Lower Rio Grande Users Meeting Proceedings, at 11. (**DVD Doc. 14**).[44]

[44] And according to Raymond Hill:

> Impairment of the quality of the waters of the Rio Grande reaching Elephant Butte Reservoir was one of the causes of the action brought by Texas against New Mexico in the Supreme Court of the United States in October 1935. Trial of this action was suspended in March 1937 by the Special Master, leaving this allegation undecided. The intent of Article XI was to terminate this controversy, but with the proviso that:

Article XII establishes the construct for the administration of the Compact by the Rio Grande Compact Commission. 53 Stat. at 791. According to M.C. Hinderlider,

> [t]he conception of the Commissioners and their advisors was that there should be as little interference as possible with the control by the duly accredited state authorities, and the present uses of water in each state, by the joint Commission for the administration of the Compact. While it was recognized that the provisions of the Compact are not self-executing, and hence require some administration aside from the collection of hydrographic data, et cetera, it will be noted that any action taken by the Commission must be unanimous. This is designed to protect the

> Nothing herein shall be interpreted to prevent recourse by a signatory State to the Supreme Court of the United States for redress should the character or quality of the water, at the point of delivery, be changed hereafter, by one signatory State to the injury of another. Nothing herein shall be construed as an admission by any signatory State that the use of water for irrigation causes increase of salinity for which the user is responsible in law.

Hill, *Development of the Rio Grande Compact of 1938*, at 185. Nothing in the 1938 Compact or in the negotiation history suggests that the Commission intended to limit future Compact disputes solely to water-quality issues.

> rights of any one state against concerted action by a mere majority of the members of the Commission.

HINDERLIDER, RIO GRANDE BASIN COMPACT, at 26. But Article XII also limits the jurisdiction of the Commission "only to the collection, correlation, and presentation of factual data and the maintenance of records having a bearing upon the administration of this Compact, and, by unanimous action, to the making of recommendations to the respective States upon matters connected with the administration of this Compact"; further, "[t]he findings of the Commission shall not be conclusive in any court or tribunal which may be called upon to interpret or enforce [the 1938] Compact." 53 Stat. at 791.

Article XIII of the 1938 Compact "provides that the Compact Commission shall meet at the request of any member of the Commission at the expiration of every five-year period after the effective date of the Compact to review any provisions which are not substantive in character and do not affect the basic principles upon which the Compact is founded." Hill, *Development of the Rio Grande Compact*, at 185; *see also* 53 Stat. at 791.

Article XIV states that "[t]he schedules herein contained and the quantities of water herein allocated shall never be increased nor diminished by reason of increases of diminution in the delivery or loss of water to Mexico." 53 Stat. at 792. As explained by Raymond A. Hill:

> There were repeated and sometimes acrimonious arguments among the Commissioners and their Advisers during the negotiations of [the] Rio Grande Compact with respect to diversions of water for use in Mexico in excess of the 60,000 acre-feet per year allocated to Mexico under the Treaty of 1906. Colorado and New Mexico demanded that such diversions be kept down to the amount prescribed by the Treaty and that each of them share in any such reduction in diversions by Mexico. Texas, on the other hand, asserted that it had no control over such diversions and could not be responsible for them. Article XIV . . . was thus a compromise.

Hill, *Development of the Rio Grande Compact*, at 185-86. Therefore, according to M.C. Hinderlider:

> Article XIV is designed to protect Colorado and New Mexico against any increases in future uses of water by Mexico over and above the 60,000 acre-feet recognized by treaty [and] any decrease in uses of water by Mexico would be to the benefit of the water users under the Elephant Butte Reservoir.

HINDERLIDER, RIO GRANDE BASIN COMPACT, at 26.

Article XV recognizes that the 1938 Compact is based solely upon conditions peculiar to the Rio Grande Basin; for that reason, it would not serve to "establish[] any general principle or precedent applicable to other interstate streams." 53 Stat. at 792. "This provision, taken from the 1929 [Interim] Compact, was universally desired because each of the three

States was involved in the allocation of water in other interstate streams." Hill, *Development of the Rio Grande Compact*, at 186. "Article XVI, also taken from the 1929 Compact, was incorporated to meet the requirments [sic] of the United States." *Id.* Article XVI states: "Nothing in this Compact shall be construed as affecting the obligations of the United States of America to Mexico under existing treaties or to the Indian tribes, or as impairing the rights of the Indian tribes." 53 Stat. at 792.

Lastly, Article XVII states that the 1938 Compact "shall become effective when ratified by each of the signatory States and consented to by the Congress of the United States." *Id.*

4. Ratification of the 1938 Compact proves difficult

The negotiation and drafting of the 1938 Compact took years, but even after the Commissioners of the Rio Grande Compact Commission signed the compact, ratification by the legislatures of the three States proved difficult. Interests in both New Mexico and Colorado threatened to block ratification in their respective legislatures if Texas did not support applications for federally constructed reservoir projects in those states – projects that could impair the volume of water received downstream by Texas without a ratified Compact in place to protect Texas's rights. *See, e.g.*, Letter from Frank B. Clayton, Rio Grande Compact Comm'r for

Texas, to Judge Edwin Mechem, counsel for the Elephant Butte Irrigation District (Aug. 12, 1938), *in* Rio Grande Compact Commission Records, Dolph Briscoe Center for American History, The University of Texas at Austin, Box 2F466 ("[M]y good friend [H.C.] Neuff[er] [Chief Engineer for the Middle Rio Grande Conservancy] . . . threatens that Albuquerque will upset the apple-cart and defeat ratification if we don't clear her project.") (**DVD Doc. 17**); Letter from Frank B. Clayton, Rio Grande Compact Comm'r for Texas, to Maj. Richard F. Burges, Counsel for El Paso County Water Improvement Dist. No. 1, at 1 (Aug. 30, 1938), *in* Rio Grande Compact Commission Records, Dolph Briscoe Center for American History, The University of Texas at Austin, Box 2F466 ("To each of these requests [to support federal funding for Colorado and New Mexico projects] I have replied that until the Compact has been ratified by the three state legislatures and approved by the Congress, it is actually not a compact and affords us no protection . . . all those gentlemen threaten to defeat ratification in their legislatures if they are prevented from getting federal funds at this time on account of [Texas's] failure to clear the projects. . . . Carr stated most emphatically that he was going to do all in his power to defeat ratification if clearance was not given to the Colorado projects.") (**DVD Doc. 18**); Letter from Frank B. Clayton, Rio Grande Compact Comm'r for Texas, to Hon. Oscar C. Dancy 1 (Sept. 20, 1938), *in* Rio Grande Compact Commission Records, Dolph Briscoe Center for American History, The University of Texas at Austin, Box 2F466 ("[I]f [Colorado and New Mexico] don't get [federal

funding for their projects], they threaten to defeat ratification in their own legislatures, a contingency [Texas] wishes to avoid if possible. The truth of the matter is that the chief reason Colorado and New Mexico agreed to the terms of the Compact was that they could build these improvements with government money, and if they don't get this money their interest in ratification [of the 1938 Compact] is materially lessened.") (**DVD Doc. 19**).[45]

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[45] In an effort to appease Colorado and New Mexico, as well as obtain protections for Texas prior to the ratification of the 1938 Compact by the States and Congress, the Texas Attorney General's Office proposed to the Attorneys General for Colorado and New Mexico terms for a consent decree in the pending, yet stayed, lawsuit involving Texas and New Mexico:

> It is not the desire of this Department, nor of the Commissioner for Texas, to defeat Colorado and New Mexico in their applications, except on grounds which we believe to be of compelling importance. We have given a good deal of thought and study to this situation and think that we have arrived at a solution which should be satisfactory to all three States.
>
> There is pending in the Supreme Court of the United States a law suit between Texas and New Mexico over the waters of the Rio Grande. Final hearings in this law suit were held in abeyance pending negotiations for a permanent compact, which it was hoped would resolve the differences between the two States. The final disposition of this law suit is in the hands of the Attorneys General of the two States, of course, quite independent of the compact, and we believe it is entirely feasible for the two States, through their counsel, to dispose of the law suit by the entry of an agreed decree embodying the provisions of the compact even prior to its ratification by the Legislature. If Colorado should intervene in this law suit, and likewise enter into such an agreed

Within Texas, irrigators in the Lower Rio Grande Valley threatened to lobby their legislators to defeat ratification of the 1938 Compact in Texas if an intrastate agreement could not be reached allowing a certain volume of water to be distributed to water users downstream of Fort Quitman to Brownsville, Texas.

> decree, the same result could be reached as by final ratification of the compact by the three State Legislatures and the approval of Congress. This, it is thought, can be done with very little delay, and if it is done the objections by the Rio Grande Compact Commissioner of Texas to the proposed projects will be withdrawn and doubtless Federal funds can be secured within the time limit which we understand has been set by the Federal authorities for the allocation of Federal funds.

Letter from H. Grady Chandler, First Assistant Att'y Gen. of Texas, to Frank H. Patton, Att'y Gen. of New Mexico, and Byron G. Rogers, Att'y Gen. of Colorado 2 (Sept. 8, 1938), *in* Rio Grande Compact Commission Records, Dolph Briscoe Center for American History, The University of Texas at Austin, Box 2F466 (**DVD Doc. 20**).

But the proposal for the consent decree became moot after New Mexico voluntarily withdrew its request for federal funding of its project, deciding to obtain their water supply elsewhere in the state; "[h]ence, there [was] no longer any necessity for haste" in consummating a deal with Texas to put into effect the protections outlined in the 1938 Compact. Letter from Frank B. Clayton, Rio Grande Compact Comm'r from Texas, to Dr. Harlan H. Barrows, National Resources Committee 3 (Oct. 1, 1938), *in* Rio Grande Compact Commission Records, Dolph Briscoe Center for American History, The University of Texas at Austin, Box 2F466 (**DVD Doc. 21**). Colorado's project had also been disapproved by the Public Works Administration. *See* Letter from Dr. Harlan H. Barrows, Nat'l Res. Comm., to Frank B. Clayton, Rio Grande Compact Comm'r from Texas (Sept. 29, 1938), *in* Rio Grande Compact Commission Records, Dolph Briscoe Center for American History, The University of Texas at Austin, Box 2F466 (**DVD Doc. 22**).

See, e.g., 1938 Lower Rio Grande Users' Meeting Proceedings, at 12-13 (**DVD Doc. 14**); Letter from Frank B. Clayton, Rio Grande Compact Comm'r for Texas, to Hon. Homer L. Leonard 2 (Aug. 3, 1938), *in* Rio Grande Compact Commission Records, Dolph Briscoe Center for American History, The University of Texas at Austin, Box 2F466 [hereinafter Aug. 3 Clayton Letter] ("[T]here seemed to me to be an indication that if [Lower Rio Grande water users'] claims were not conceded by the upper [water] districts, the lower water users would oppose ratification.") (**DVD Doc. 23**).

Lower Rio Grande water users were convinced that their interests had not been taken into account when the Rio Grande Compact Commission allocated Rio Grande waters to each State under the 1938 Compact:

> Of course I know this: I know we are interested in getting our proportionate share of the water, the share to which we are entitled. Under the compact between the States of Texas, Colorado and New Mexico, none of the diversions below Fort Quitman have been taken into consideration. . . . I understand that under the ruling of the Supreme Court laid down in the la Plata [sic] case, each State is entitled to its proportionate part of the water, that is to an equitable apportionment. . . . In view of the fact that the users below Fort Quitman haven't been taken into consideration, we rather feel that in justice to them some provision should be made for a certain diversion for the lower users of this Rio Grande water.

1938 Lower Rio Grande Users' Meeting Proceedings, at 5 (statement of Judge Ben E. King, attorney for the Maverick County Water Control and Improvement District No. 1) (**DVD Doc. 14**). Indeed, Lower Rio Grande water users, reading the 1938 Compact for the first time without the benefit of knowledge of the long history of the dispute and of the Rio Grande Project, the scientific data forming the foundation for the compact, and the negotiating history leading to the final compact, wondered if the Rio Grande Compact Commissioner from Texas had bargained for the best deal that he could have obtained. *See id.* at 15-16.[46]

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[46] The Lower Rio Grande water users were not even aware that the authority of the Rio Grande Compact Commission was limited to apportionment of the waters above Fort Quitman and the reasons for that limitation. As explained to Lower Rio Grande water users in May 1938 by Frank B. Clayton, Rio Grande Compact Commissioner from Texas, with assistance from Dr. Harlan H. Barrows of the National Resources Committee and Mr. Roland Harwell, Manager of the El Paso County Water Improvement District No. 1, the problem of apportionment of Rio Grande waters dated back to the turn of the twentieth century and the claims of Mexico to the waters near El Paso and Juarez. *See* 1938 Lower Rio Grande Users' Meeting Proceedings, at 15-16. As noted by Harwell:

> Then when the United States and Mexico got off together to settle their differences, they settled on that portion of the river along which there were difficulties and didn't include any other part, because there were no difficulties. . . .
>
> In those days the river petered out at Fort Quitman or above completely, and nobody could feel certain that there would be any water in the stream down there during the summer, unless water flowed in from other

Over the course of several conversations with various Lower Rio Grande water users and their counsel, Frank B. Clayton, Rio Grande Compact Commissioner for Texas, and others, attempted to educate those water users as to two realities: (1) the geography of Southern Texas and (2) the preemptive nature of the Rio Grande Project as operated by Reclamation. First,

> as a practical matter, when we talk about deliveries of water to Texas, we are speaking of deliveries into the reservoir at Elephant Butte, because below Elephant Butte there are no tributaries to speak of, and, except in times of flood, the flow is not augmented in any considerable measure until after the water passes Fort Quitman.
>
> . . . .
>
> [T]he lands above Fort Quitman receive their entire water supply from the Rio Grande and its tributaries in Colorado and New Mexico. The lands below Fort Quitman, except those immediately below, receive by far the greater part of their supply from tributaries flowing in below that point in Texas and Mexico.

See id. at 10, 15 (statements of Frank B. Clayton); *see also* Aug. 3 Clayton Letter, at 4 ("[B]ecause of the small quantity [of water] that can actually, physically be

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> sources prior to 1906. So, I think the river just naturally got divided into two sections; they tried to solve the problem up above; there was no problem to solve down below. Not then.

Id. at 16.

passed and the very poor quality of the water, the amount which you could beneficially use twelve hundred miles below us would be infintesimal [sic]. . . .") (**DVD Doc. 23**). And as to the water entering the Rio Grande via tributaries below Fort Quitman, appropriators on both sides of the U.S.-Mexico border diverted it at will to irrigate their lands. May 1938 Lower Rio Grande Users' Meeting Proceedings, at 17-18 (**DVD Doc. 14**).

Second, Clayton explained that "for the benefit of the lands above Fort Quitman, [Reclamation had appropriated] all [of] the unappropriated waters in New Mexico[;] Elephant Butte dam was constructed, and is being paid for by farmers within the Rio Grande Project." *Id.* at 10. Roland Harwell, Manager of the El Paso County Water Improvement District No. 1, explained the limits of the Rio Grande Project:

> [O]ur project ends at the end of the Tornillo district, a point down below Fabens a relatively short distance. The last diversion which we contemplate making here will be at Ysleta, twelve miles below El Paso. Our control over the water still will end at Fabens, in part, and at the head of the Tornillo main canal, at the end of the Tornillo district. . . . What happens beyond that point, and Fort Quitman is well beyond that point, is something wholly without our control as it is without your control.

Id. at 16. Because of diversions of tributary water occurring immediately below the last delivery of water

by the Rio Grande Project, Reclamation could not guarantee a delivery of 200,000 acre-feet of water at Fort Quitman, even if it were so inclined, as requested by the Lower Rio Grande water users. *Id.* at 16-17. As succinctly put to the Lower Rio Grande water users by Harwell: "[Y]ou need storage; and you need a treaty [with Mexico]. . . ." *Id.* at 17; *see also* Letter from Frank B. Clayton, Rio Grande Compact Comm'r for Texas, to Gov. W. Lee O'Daniel 4 (Nov. 16, 1938), *in* Rio Grande Compact Commission Records, Dolph Briscoe Center for American History, The University of Texas at Austin, Box 2F466 [hereinafter 1938 Gov. O'Daniel Letter] ("[Indeed], it has been only in very recent years that the lower Rio Grande valley has suffered from lack of water, and these dry seasons have alternated with seasons of destructive floods, the waters of which, if impounded, would afford a dependable and ample supply.") (**DVD Doc. 24**). And, as simplified further by Dr. Harlan Barrows of the National Resources Committee: "No compact, no treaty; no treaty, no storage dams; no dams, no regulation of the waters of the lower river." May 1938 Lower Rio Grande Users' Meeting Proceedings, at 21 (**DVD Doc. 14**).

While the Lower Rio Grande water users contemplated their options, one attorney investigated the negotiations of the Rio Grande Compact Commission. Sawnie B. Smith, an attorney representing the Water Conservation Association of the Lower Rio Grande Valley, wrote to Frank Clayton, Rio Grande Compact Commissioner from Texas, to ask for clarification on the

1938 Compact's terms regarding the water allocation to Texas:

> There has been considerable comment on the fact that the Rio Grande Compact between Colorado, New Mexico and Texas, dated March 18, 1938, makes no provision for the division of waters below Elephant Butte between the States of New Mexico and Texas and makes no provision concerning the amount of water to which Texas is entitled.
>
> I understand that theoretically, if not in fact, the total amount of water in the project storage provided for in the compact is used or needed by the Rio Grande project except the portion thereof required to be delivered to Mexico. I also understand that the Rio Grande project is an established, defined area lying about 60% in New Mexico and about 40% in Texas. Therefore, if these understandings are correct, and the present usage and physical conditions remain the same, the division of the waters as between Texas and New Mexico would be in the proportions of the Rio Grande project area in said two States.
>
> I do not find anything in the compact, however, which ties down and limits the use or division of the waters according to present usage and physical conditions, and nothing that would prevent controversy between the two States in the future regarding the division of the waters between the two States.
>
> This omission is too obvious to have been inadvertent, and, therefore, unquestionably,

> the Commissioners had what they considered valid reason for it. On behalf of a number of interested parties in this area, I would appreciate it very much if you would advise me why the respective rights of Texas and New Mexico to these waters were not defined and provided for in the compact in express terms.

Letter from Sawnie B. Smith, Esq., to Frank B. Clayton, Rio Grande Compact Comm'r (Sept. 29, 1938), *in* Rio Grande Compact Commission Records, Dolph Briscoe Center for American History, The University of Texas at Austin, Box 2F466 [hereinafter Sept. 1938 Sawnie Smith Letter] (**DVD Doc. 25**).

In response, Clayton explained:

> The question of where the point of division of the waters of the Rio Grande as between Texas and New Mexico should be fixed has been the subject of a great deal of study ever since the original Rio Grande Compact Act was passed, in 1928. It was decided prior to the signing of the temporary compact that New Mexico's obligations as expressed in the compact must be with reference to deliveries at Elephant Butte reservoir, and this provision was inserted in the temporary compact. The reasons for it are numerous. In fact, the obstacles in the way of providing for any fixed flow at the Texas line were considered insuperable.
>
> The Rio Grande Project, as you know, is operated as an administrative unit by the

Bureau of Reclamation, and the dam and releases from the reservoir are controlled by the Bureau and will continue to be at least until the federal government is repaid its investment, and very probably even beyond that time. Obviously, neither Colorado nor New Mexico could be expected to guarantee any fixed deliveries at the Texas line when the operation of the dam is not within their control but is in the control of an independent government agency.

Moreover, measurements of the waters passing the Texas state line would be very difficult and expensive, if not impossible. This, for the reason that irrigation canals, ditches and laterals cross the line, which is of a very irregular contour, at many different points, carrying water in addition to what is carried in the river, itself, and it would require continual measurements in these various channels to make any reasonably accurate computations of the total flow.

However, the question of the division of the water released from Elephant Butte reservoir is taken care of by contracts between the districts under the Rio Grande Project and the Bureau of Reclamation. These contracts provide that the lands within the Project have equal water rights, and the water is allocated according to the areas involved in the two States. By virtue of the contract recently executed, the total area is "frozen" at the figure representing the acreage now actually in cultivation: approximately 88,000 acres for the

> Elephant Butte Irrigation District, and 67,000 for the El Paso County Water Improvement District No. 1, with a "cushion" of three per cent. [sic] for each figure.
>
> I apprehend that there will never be any difficulty about the allocation of this water.
>
> The arrangement just mentioned is of course a private one between the districts involved, and for that reason it was felt neither necessary or desirable that it be incorporated in the terms of the Compact.
>
> The lands above Fort Quitman and below the Rio Grande Project eastern boundary receive only "tail-end" or waste water, the lands in the Hudspeth County district taking its water by virtue of a contract and the lands privately owned below the district lower boundary only by taking by gravity or pumps what happens to be in the river channel.
>
> The deliveries to Mexico are of course governed by treaty.

Letter from Frank B. Clayton, Rio Grande Compact Comm'r of Texas, to Sawnie B. Smith, Esq. 1-2 (Oct. 4, 1938), *in* Rio Grande Compact Commission Records, Dolph Briscoe Center for American History, The University of Texas at Austin, Box 2F466 [hereinafter Oct. 1938 Frank Clayton Letter] (**DVD Doc. 26**).

After many conversations with and among Lower Rio Grande water users over several months,[47] "the governing board of the Water Conservation Association of the Lower Rio Grande Valley . . . adopted a resolution endorsing ratification of the [1938] Compact." Letter from Frank B. Clayton, Rio Grande Compact Comm'r of Texas, to Sen. H.L. Winfield of Texas 1 (Feb. 7, 1939), *in* Rio Grande Compact Commission Records, Dolph Briscoe Center for American History, The University of Texas at Austin, Box 2F466 (**DVD Doc. 27**).[48] At that point, the legislatures of the signatory States ratified the compact. *See* Act of Feb. 21, 1939, ch. 146, 1939 Colo. Sess. Laws 489; Act of Mar. 1, 1939, ch. 33,

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[47] *See, e.g.*, Letter from Frank B. Clayton, Rio Grande Compact Comm'r of Texas, to Sen. H.L. Winfield of Texas 1 (Feb. 7, 1939), *in* Rio Grande Compact Commission Records, Dolph Briscoe Center for American History, The University of Texas at Austin, Box 2F466 (recounting Clayton "spen[ding] a week last fall [near Brownsville, Texas], talking with various leaders in the valley – directors, managers, and attorneys of the irrigation districts, and other men of prominence in the towns between Mission and Brownsville") (**DVD Doc. 27**); 1938 Gov. O'Daniel Letter, at 5 (recounting meetings in the Lower Rio Grande Valley, "meeting with representatives of the various interests, and we discussed with each other freely and frankly all the ramifications of the compact and the possible solution of our mutual problems") (**DVD Doc. 24**).

[48] In 1944, the United States and Mexico ratified a treaty allocating the waters of the Colorado and Tijuana rivers, as well as the Rio Grande river from Fort Quitman, Texas, downstream to the Gulf of Mexico. Treaty Between the United States of America and the United Mexican States Relating to the Utilization of the Waters of the Colorado and Tijuana Rivers, and of the Rio Grande (Rio Bravo) from Fort Quitman, Texas, to the Gulf of Mexico, U.S.-Mex., Feb. 3, 1944, 59 Stat. 1219.

1939 N.M. Laws 59; Act of Mar. 1, 1939, ch. 3, 1939 Tex. Gen. Laws 531. The 1938 Compact became federal law in May 1939. *See* Act of May 31, 1939, ch. 155, 53 Stat. 785.

Raymond A. Hill, former engineering assistant for Reclamation and Texas's engineering advisor to the Commission, recounted in the late 1960s:

> The Rio Grande Compact of 1938 has been condemned by some as being unduly complicated, poorly written, and of uncertain intent. If read, however, in the light of the history of irrigation developments along the Rio Grande in Colorado, New Mexico, and Texas and with appreciation of the antagonisms among these States and between segments of them at the time of negotiation of that Compact, its apparent complications are reconciled, the language is clarified, and the intent of the negotiators becomes evident.
>
> Long before 1938, it had become obvious that the quantities of water obtainable for the Rio Grande were not sufficient to satisfy the demands on this supply for irrigation of all of the areas under canal systems in Colorado, New Mexico, and Texas. Elephant Butte Dam was built by the Federal Government to capture flood waters and thereby relieve the acute shortages in supply below that point that had been caused by expansion of irrigation agriculture in Colorado. In addition, an embargo was placed on further developments in Colorado.

Water resource developments in New Mexico above Elephant Butte were dormant during this period of expansion in Colorado. In 1926, however, a study was undertaken by the Federal Government, in cooperation with local interests, which had as its objective rehabilitation of the Middle Rio Grande Valley by construction of storage works, new canal systems, and drainage of the valley lands.

The reaction of Colorado to this program was adverse because of the resentment of the embargo on new developments in Colorado. The reaction among the water users in Texas and in New Mexico below Elephant Butte was also adverse because they feared that any expansion of use upstream would impair their water supply. It was in this atmosphere that the Rio Grande Compact of 1929 was negotiated.

The Middle Rio Grande Project was constructed soon thereafter, unfortunately just as a drought began and the natural flow of Rio Grande became insufficient to maintain an ample supply of water in Elephant Butte Reservoir. The condition brought about, in 1935, the action of the Supreme Court of the United States of *Texas v. New Mexico*. This action intensified the antagonism that had long existed between water users in the Rio Grande Federal Reclamation Project and those in the Middle Rio Grande Project.

Colorado had insisted on the inclusion in the 1929 Compact of provisions intended to

result in the construction of the Closed Basin Drain by the Federal Government. If this drain had been built, Colorado would have been entitled to expand its consumptive use of water by the quantity so salvaged. This drain was not built, nor were any other works built in place of it. Colorado thus entered the negotiations of the 1938 Compact with the feeling that it had been treated unfairly by the representatives of New Mexico and Texas.

The Rio Grande Compact Commissioners, during their meetings in 1937 and 1938, thus had to divide an insufficient supply among three groups of water users, each of which was antagonistic to the other two. Their solution was to hold to the principles of the 1929 Compact and to depart as little as practicable from its provisions.

The Committee of Engineering Advisers was instructed to prepare schedules of deliveries by Colorado and by New Mexico that would insure maintenance of the relationships of stream inflow to stream outflow that had prevailed under the conditions existent when the Compact of 1929 was executed. The Committee of Engineering Advisers was also instructed to provide for freedom of development of all water resources in the drainage basin of Rio Grande above Elephant Butte subject only to compliance with these schedules. Both tasks were accomplished, but only after much time and effort and argument as to the wording of each phrase in their reports to the Commission.

> The Committee of Legal Advisors, who prepared the draft of the 1938 Compact, used the language of the 1929 Compact where possible. They also adopted almost verbatim the wording of the reports of the Engineering Advisers to avoid renewal of controversies that had been resolved.
>
> The Rio Grande Compact of 1938 should thus be looked upon as an expansion of the Compact of 1929, designed to provide for the maximum beneficial use of water in the basin of Rio Grande above Fort Quitman without impairment of any supplies beneficially used under the conditions prevailing in 1929.

Hill, *Development of the Rio Grande Compact of 1938*, at 197-98.

IV. New Mexico's Motion to Dismiss Texas's Complaint

The Supreme Court granted leave to Texas on January 27, 2014, to file its Complaint. *See* 134 S. Ct. 1050 (2014). In its Complaint, Texas alleges that various actions of New Mexico violate the 1938 Compact, thereby depriving Texas of its equitable apportionment of water to which it is entitled pursuant to the 1938 Compact. *See* Compl. ¶ 18. Specifically, Texas alleges that New Mexico, through the actions of its officers, agents, and political subdivisions, has violated the 1938 Compact by allowing the diversion of surface water and pumping of groundwater that is hydrologically connected to the Rio Grande downstream of the Elephant

Butte Reservoir, thereby diminishing the amount of water that flows into Texas via the administration of Rio Grande Project by tens of thousands of acre-feet. *Id.* ¶¶ 18-19. Texas seeks: (i) declaratory relief as to its rights to the waters of the Rio Grande pursuant to the 1938 Compact; (ii) an order compelling New Mexico to "deliver the waters of the Rio Grande in accordance with the provisions of the Rio Grande Compact and the Rio Grande Project Act" and enjoining New Mexico from interfering with or usurping the United States' authority to operate the Rio Grande Project; and (iii) an order awarding damages including pre- and post-judgment interest for injuries suffered by Texas as a result of New Mexico's actions. *Id.* at 15-16.

New Mexico moves to dismiss Texas's Complaint for failure to state a claim upon which relief can be granted under the terms of the 1938 Compact. New Mexico asserts that Texas's claim that New Mexico has "allowed and authorized Rio Grande Project water intended for use in Texas to be intercepted and used in New Mexico" fails to state a claim under the 1938 Compact because the compact does not require New Mexico to deliver or guarantee water deliveries to the New Mexico-Texas state line or "to prevent diversion of water after New Mexico has delivered it at Elephant Butte Reservoir." Mot. to Dismiss at 28 (quoting Compl. ¶ 4). Indeed, New Mexico argues that its *only* duty under the 1938 Compact is to deliver water to Elephant Butte Reservoir. *See id.* at 59, 61 ("New Mexico's duty under the Compact is to deliver water to Elephant Butte Reservoir, and neither Texas nor the

United States alleges that New Mexico breached that duty. . . . In sum, New Mexico's duty under the Compact is to deliver water to Elephant Butte."). New Mexico, therefore, argues that it has no duty under the 1938 Compact "to limit post-1938 development below Elephant Butte" within its boundaries. *Id.* at 45. New Mexico further asserts that New Mexico state law – not the 1938 Compact – governs the distribution of water released from Elephant Butte Reservoir within New Mexico state boundaries. *See* Reply Br. at 14-15 ("Texas' and the United States' reading of the Compact . . . transforms Article IV's requirement that New Mexico deliver water to Elephant Butte into a silent but sweeping relinquishment of New Mexico's sovereign authority to regulate the use of state waters in southern New Mexico and a complete disavowal of this Court's long-standing recognition of the primacy of state water law under Section 8 of the Reclamation Act.").

Texas filed a brief in opposition to New Mexico's motion to dismiss. Texas argues not that New Mexico has a state line delivery obligation under the Compact of 1938, but rather that the Compact imposes upon New Mexico an obligation

> to deliver a scheduled amount of Rio Grande water into Elephant Butte Reservoir, to relinquish control of that water for storage and distribution by the Rio Grande Project, and not to intercept, deplete or otherwise interfere with water released by the Rio Grande Project

> for the benefit of Rio Grande Project lands in Texas.

Texas Opp. Mot. to Dismiss at 22. Texas maintains that New Mexico's obligation to deliver the water *is* an obligation to relinquish control of it and that New Mexico's delivery obligation "would be meaningless if New Mexico could simply deliver water into Elephant Butte Reservoir only to recapture the same water at any point before it reaches irrigable land in Texas." *Id.* at 28. According to Texas, New Mexico's reading of the Compact of 1938 would ignore other provisions of the Compact, such as Article IV's fixed delivery schedules, Article VI's Accrued Debit provision, and Article VII's storage limitations, *id.* at 32-33, and likewise would ignore the role of federal reclamation law requiring users of water from federal reclamation projects to have contracts with the United States. *Id.* at 41-45. Texas also argues that, having the force of federal law, the Compact, and not New Mexico state law, "controls how water is apportioned to Texas." *Id.* at 58.

The United States also filed a brief in opposition to New Mexico's motion to dismiss. Four *amici curiae* filed briefs as well: the City of Las Cruces, New Mexico filed its brief in support of the motion to dismiss, while the City of El Paso, Texas, the Hudspeth County Conservation and Reclamation District No. 1, and the El Paso County Water Improvement District No. 1 filed briefs in opposition to the motion to dismiss. New Mexico submitted a Reply Brief on July 1, 2014. Counsel for parties New Mexico, Colorado, Texas, and the

United States, as well as *amici curiae* City of Las Cruces, City of El Paso, Texas, and El Paso County Water Improvement District No. 1 presented oral argument[49] at a hearing to consider the motion to dismiss held in New Orleans, Louisiana, on August 19, 2015.

Based upon the standard of review for motions filed in the nature of a motion under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the pleadings filed by the parties and the *amici curiae*, and the oral arguments advanced by those parties, I recommend that the Court deny New Mexico's motion to dismiss Texas's Complaint.

A. Standard of Review

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides guidance in ruling on New Mexico's motion to dismiss. Under Rule 12(b)(6), all factual allegations contained in Texas's Complaint and the United States' Complaint in Intervention are assumed to be true. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *see also Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969) (stating that a complaint should be liberally construed in favor of the non-movant). "To survive a motion to dismiss, a complaint must contain sufficient

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[49] *Amici curiae* City of Las Cruces, City of El Paso, Texas, and El Paso County Water Improvement District No. 1 filed motions pursuant to Supreme Court Rule 28.7 to participate in oral argument on the motion to dismiss. *See* SM R. Docs. 13, 18, 30. Those motions were granted on July 14, 2015. *See* Modified Case Mgmt. Order No. 4 (SM R. Doc. 32).

factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570).

Here, the States of Colorado, New Mexico, and Texas negotiated and ratified the 1938 Compact, which equitably apportioned all of the waters of the Rio Grande above Fort Quitman among those States; Congress subsequently approved the 1938 Compact. "Congressional consent transforms an interstate compact . . . into a law of the United States." *Cuyler v. Adams*, 449 U.S. 433, 438 (1981). In interpreting federal statutes, "[i]t is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (internal quotations and citations omitted); *see also United States v. Menasche*, 348 U.S. 528, 538-39 (1955) ("It is our duty 'to give effect, if possible, to every clause and word of a statute.'" (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)).

But it is also appropriate to "look[] to legislative history and other extrinsic material when required to interpret a statute which is ambiguous." *Oklahoma v. New Mexico*, 501 U.S. 221, 235 n.5 (1991) (internal citations omitted). The Supreme Court has examined "evidence regarding the negotiating history of other interstate compacts." *Id.* (citing *Texas v. New Mexico*, 462 U.S. 554, 568 n.14 (1983); *Arizona v. California*, 292 U.S. 341, 359-60 (1934)). "Thus, resort to extrinsic

evidence of the compact negotiations . . . is entirely appropriate" here if the 1938 Compact language is ambiguous. *Oklahoma*, 501 U.S. at 235. Further, "[e]xamination of purpose is a staple of statutory interpretation that makes up the daily fare of every appellate court in the country. . . ." *McCreary Cnty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 865 (2005) (citing *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004) (interpreting federal statute in light of its "text, structure, purpose, and history")).

And a congressionally approved compact is a contract as well as a statute; therefore, "[i]nterstate compacts are construed as contracts under the principles of contract law." *Tarrant Reg'l Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2130 (2013) (citing *Texas v. New Mexico*, 482 U.S. 124, 128 (1987)). A compact's express terms are "the best indication of the intent of the parties." *Id.* (citing *Montana v. Wyoming*, 131 S. Ct. 1765, 1771-72 & n.4 (2011); RESTATEMENT (SECOND) OF CONTRACTS § 203(b) (1979)).

As stated before, and consistent with *Arizona v. California*, 373 U.S. 546, 552 (1963), this report and recommendation recounts the relevant legislative and negotiating history in order to give the Compact context. However, nothing detailed herein should be construed as fact finding violative of Fed. R. Civ. P. 12, as nothing in the historical record was dispositive regarding the ultimate recommendations of the report.

B. Texas Has Stated a Claim Under the Unambiguous Text and Structure of the 1938 Compact

The preamble to the 1938 Compact unambiguously declares that, through the 1938 Compact, the signatory States intended to apportion equitably all of the waters of the Rio Grande above Fort Quitman among the three States. *See* 1938 Compact, 53 Stat. 785.[50] An examination of the plain text and structure of the 1938 Compact reveals that the signatory States intended

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[50] Due to the history of inconsistency and insufficiency of Rio Grande waters annually available for irrigation, there seems to be no question that the 1938 Compact apportioned *all* of the water of the Rio Grande above Fort Quitman among Colorado, New Mexico, and Texas, reserving none. As stated by Raymond A. Hill, engineer advisor to the Rio Grande Compact Commission from Texas:

> Long before 1938, it had become obvious that the quantities of water obtainable for the Rio Grande were *not sufficient* to satisfy the demands on this supply for irrigation of all of the areas under canal systems in Colorado, New Mexico, and Texas. Elephant Butte Dam was built by the Federal Government to capture flood waters and thereby relieve the acute shortages in supply below that point that had been caused by expansion of irrigation agriculture in Colorado. . . .
>
> . . . .
>
> The Rio Grande Compact of 1938 should . . . be looked upon as an expansion of the Compact of 1929, designed to provide for the *maximum* beneficial use of water in the basin of Rio Grande above Fort Quitman without impairment of any supplies beneficially used under the conditions prevailing in 1929.

Hill, *Development of the Rio Grande Compact*, at 197-98 (emphasis added).

the Rio Grande Project to be the sole vehicle by which Texas and lower New Mexico would receive their equitable apportionments of the Rio Grande waters. Starting with the definitions found in Article I and including all of the articles creating the detailed system of accountability to ensure each State received its equitable share of water, the Rio Grande Project, referred to in the 1938 Compact as the "Project," is wholly incorporated throughout the 1938 Compact, which imposes rights and duties on each of the signatory States in that context.

1. The text of the 1938 Compact requires New Mexico to relinquish control of Project water permanently once it delivers water to the Elephant Butte Reservoir

Article II of the Compact requires the Rio Grande Compact Commission to maintain and operate a series of gauging stations at regular intervals along the main stem of the Rio Grande to "secur[e] records required for the carrying out of the Compact," *id.* at 786, and, according to delivery schedules identified in the 1938 Compact that are based upon those records, Colorado and New Mexico are required to "deliver" water at certain points along the Rio Grande, after each has taken its equitable share of the waters of the stream, *see id.* at 787-88 (containing Articles III and IV). Article III of the 1938 Compact requires Colorado "to *deliver* water in the Rio Grande at the Colorado-New Mexico State Line, measured at or near Lobatos, in each calendar

year. . . ." *Id.* at 787 (emphasis added). Article IV of the 1938 Compact requires New Mexico "to *deliver* water in the Rio Grande at San Marcial, during each calendar year. . . ." *Id.* at 788 (emphasis added).[51]

The word "deliver," according to contemporary authority, is defined as follows: "To deliver property to another means to surrender it to that person. To give with one hand and to take back with the other is no delivery." BALLENTINE'S LAW DICTIONARY 353 (1930); *see also* BLACK'S LAW DICTIONARY 349, 842 (2d ed. 1910) (defining "delivery" in the context of conveyancing as "[t]he final and absolute transfer of a deed, properly executed, to the grantee, or to some person for his use, in such a manner that it cannot be recalled by the grantee"). Similarly, in general contemporary usage, "deliver" is defined as "[t]o give or transfer; to yield possession or control of; to part with (to); to make or hand over . . . to commit; to surrender." WEBSTER'S SECOND NEW INTERNATIONAL DICTIONARY 963 (1934).

Articles III and IV of the 1938 Compact identify the delivery of water by Colorado and New Mexico to be an "obligation," 53 Stat. at 787-88, which is "a legal duty by which a person is bound to do or not to do a certain thing," BLACK'S LAW DICTIONARY 842 (2nd ed.

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[51] New Mexico's point of delivery was later changed to Elephant Butte Reservoir in 1948 by a unanimous decision of the Rio Grande Compact Commission because river conditions at San Marcial made gauge maintenance impossible. *See* Resolution of the Rio Grande Compact Commission at the Annual Meeting Held at El Paso, Texas, Feb. 22-24, 1948, Changing Gaging Stations and Measurements of Deliveries by New Mexico.

1910). The 1938 Compact pairs that "obligation . . . to deliver water" with the mandatory term "shall" to connect the duty to relinquish control with certain volumes of water identified in the delivery schedules, *i.e.*: "The *obligation* of New Mexico to *deliver* water in the Rio Grande at San Marcial . . . *shall* be that quantity set forth in the following tabulation of relationship, which corresponds to the quantity at the upper index station." 53 Stat. at 788 (emphasis added).

Thus, the plain text of Article IV of the 1938 Compact requires New Mexico to relinquish control and dominion over the water it deposits in Elephant Butte Reservoir. If, as Texas alleges, New Mexico intercepts or diverts water it delivers to the Rio Grande Project immediately upon release from Elephant Butte Reservoir, it disregards the text of Article IV and renders the common and straightforward meanings of the terms "obligation" and "deliver" in Article IV void, which offends the principles of federal statutory construction as well as those of contractual interpretation.

New Mexico maintains that "Texas appears to argue that the Compact includes an implied covenant prohibiting New Mexico from 'allow[ing] and authoriz[ing]' downstream diversions after New Mexico has performed its duty to deliver the water at Elephant Butte Reservoir" and that any such implied covenant cannot be read into an interstate compact. Mot. to Dismiss at 36. However, New Mexico's duties to relinquish control of the water at Elephant Butte and to refrain from post-Compact depletions of water below Elephant Butte do not arise from any implied covenant

or implied term, but from the very meaning of the text of the Compact.

2. The structure of the 1938 Compact integrates the Rio Grande Project wholly and completely, thereby protecting both deliveries to and releases from Elephant Butte Reservoir

Once New Mexico delivers water to Elephant Butte Reservoir/Rio Grande Project, that water becomes "Usable Water," which is defined by the 1938 Compact in Article I(*l*) as "all water, exclusive of credit water,[52] which is in *project storage* and which is available for release in accordance with *irrigation demands*, including deliveries to Mexico." *Id.* at 786 (emphasis added). During oral argument, New Mexico confirmed the common understanding that the "irrigation demands" as identified in the definition of "Usable Water" refer to the acres in both Texas and lower New Mexico that are irrigated via the administration of the Rio Grande Project. *See* Hr'g Tr. 34:23-35:12, Aug. 19, 2015.

The term "Project Storage" as used in the definition of "Usable Water" is defined in Article I(k) in the 1938 Compact as "the combined capacity of Elephant Butte Reservoir and all other reservoirs actually available for the storage of usable water below Elephant

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[52] "Credit Water" is defined by the 1938 Compact in Article I(m) as "that amount of water in project storage which is equal to the accrued credit of Colorado, or New Mexico, or both." 53 Stat. 786.

Butte and above the first diversion to the lands of the Rio Grande Project, but not more than a total of 2,638,860 acre feet." 53 Stat. at 786. Article VI requires that "all credits and debits of Colorado and New Mexico shall be computed for each calendar year; provided, that in a year of actual spill no annual credits nor annual debits [shall] be computed for that year." *Id.* at 789. This annual computation would reflect whether either Colorado or New Mexico failed to deliver the full volume of its required deliveries pursuant to the detailed schedules in Articles III and IV of the 1938 Compact, or if either delivered water in excess of its required deliveries. Colorado is generally limited by the 1938 Compact to 100,000 annual and accrued debits, and New Mexico is limited, with exceptions, to 200,000 accrued debits; both States must "retain water in storage at all times to the extent of its accrued debit." *Id.*

Article VII of the 1938 Compact prohibits Colorado and New Mexico from increasing the amount of water in storage in reservoirs constructed after 1929 whenever there is less than 400,000 acre feet of "Usable Water" in "Project Storage," subject to two exceptions: when Reclamation has released from Project Storage a volume of water that is, on average, greater than 790,000 acre feet per year, or when Colorado or New Mexico elects to relinquish available Accrued Credits. *Id.* at 790. Article VII thus protects Colorado and New Mexico should Reclamation release too much water from Elephant Butte Reservoir; but it also protects access to Rio Grande flood waters by New Mexico below

Elephant Butte and by Texas.[53] In fact, Article VIII allows Texas to demand during the first month of each calendar year that Colorado and New Mexico – and New Mexico can demand that Colorado – release water from storage reservoirs constructed in upstream States after 1929 up to the amount of upstream States' Accrued Debits sufficient to maintain the volume of water in "Project Storage" to 600,000 acre feet during the first quarter of the year, "to the end that a normal release of 790,000 acre feet may be made from project storage in that year" to irrigate lands in Texas, lower New Mexico, and Mexico. *Id.*

It is clear from the structure and interplay of the articles of the 1938 Compact – specifically Articles I-IV, VI, VII, and VIII – that the 1938 Compact presumes and fully relies upon the Rio Grande Project, and protects water deliveries to the Project. But the purposes identified in Article I's definition of "Usable Water" and in Article VIII indicate that the 1938 Compact also protects the water that is released from Elephant Butte in order for it to reach its intended destination. "Usable Water" is that water "available for release in accordance with irrigation demands, including deliveries to Mexico." *Id.* at 786. And the purpose of Article VIII's grant to Texas allowing it to make a water call each January on Colorado and/or New Mexico to release stored water sufficient to bring the Usable Water in Project Storage to 600,000 acre-feet is so "that a normal release of 790,000 acre-feet may be made from

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[53] *See* Raymond A. Hill, *Development of the Rio Grande Compact of 1938*, 14 NAT. RESOURCES J. 163, 194-96 (1974).

project storage that year" to meet the Project's contractual irrigation demands. *Id.* at 790.

The text and structure of the 1938 Compact do not simply require New Mexico to make water deliveries to Elephant Butte Reservoir, as New Mexico asserts. Rather, the 1938 Compact is a comprehensive agreement, the text and structure of which equitably apportion water to Texas, as well as to Colorado and New Mexico, and provides a detailed system of accountability to ensure that each State continues to receive its equitable share. New Mexico's obligations under the 1938 Compact do not end discretely at Article IV, but are woven throughout the 1938 Compact to effect the overall purpose of the Compact.

In the context of New Mexico's Motion to Dismiss, I am required to assume as true, under Rule 12(b)(6), Texas's factual allegation that New Mexico, through its officers, agents, and political subdivisions, is diverting or intercepting water that belongs to Texas after Reclamation releases it from Elephant Butte Reservoir to irrigate lands of the Rio Grande Project. Those actions by New Mexico, if true, would render senseless and purposeless the numerous 1938 Compact articles outlining the basic accounting structure of the deal struck among the signatory States. With the defined terms found in Article I, the 1938 Compact articles: (i) requiring New Mexico to "deliver" water to the Project using the fixed delivery schedule based upon gauges and measurements of river flow, *id.* at 786-87, 788 (Articles II & IV); (ii) requiring Colorado and New Mexico to calculate and limit the debits and credits each can accrue,

id. at 789 (Article VI); (iii) protecting access to Rio Grande flood waters for New Mexico below Elephant Butte and for Texas, *id.* at 790 (Article VII); and (iv) allowing Texas the right to demand Colorado and New Mexico release water in January of each year to bring the volume of usable water in Elephant Butte Reservoir to 600,000 acre feet during the first quarter to ensure the Rio Grande Project can make its deliveries, *id.* (Article VIII), are *all void* if New Mexico delivers water to the Rio Grande Project at Elephant Butte Reservoir and then immediately grabs it back upon release from the Reservoir. An acceptance of New Mexico's reading of the 1938 Compact would require me to violate "a cardinal principle of statutory construction" which requires me to avoid construing the Compact in such way that renders entire articles "superfluous, void, or insignificant." *TRW Inc.*, 534 U.S. at 31. Indeed, conversely, New Mexico has identified in its pleadings and at oral argument *no* provision in the 1938 Compact that would allow it to recapture water it has delivered to the Rio Grande Project upon release from the Elephant Butte Reservoir. *See* Hr'g Tr. 39:10-40:11, Aug. 19, 2015.

Moreover, New Mexico's narrow reading of the 1938 Compact also leaves the question of Texas's equitable apportionment under the 1938 Compact an open, major source of controversy. To accept New Mexico's reading would defeat the Compact's express purpose to remove all such causes of controversy:

> The State of Colorado, the State of New Mexico, and the State of Texas, *desiring to remove*

> *all causes of present and future controversy among these States and between citizens of one of these States and citizens of another State with respect to the use of the waters of the Rio Grande above Fort Quitman, Texas*, and being moved by considerations of interstate comity, and for the purpose of effecting an equitable apportionment of such waters, have resolved to conclude a Compact for the attainment of these purposes. . . .

53 Stat. at 785 (emphasis added). Although the preamble by itself is not conclusive, it does support a holistic reading of the Compact by which each Article is given meaning and purpose, instead of the stunted interpretation that New Mexico advances. *See, e.g., Virginia v. Maryland*, 540 U.S. 56, 68-69 (2003).

C. The Purpose and History of the 1938 Compact Confirm the Reading That New Mexico Is Prohibited from Recapturing Water It Has Delivered to the Rio Grande Project After Project Water Is Released from the Elephant Butte Reservoir

Because the text and structure of the 1938 Compact unambiguously protect the administration of the Rio Grande Project as the sole method by which Texas receives all and New Mexico receives part of their equitable apportionments of the stream, no need exists to rely upon the history of the 1938 Compact to interpret that language. *See Kansas v. Colorado*, 514 U.S.

673, 690 (1995). But in addition to its text and structure, the purpose and history of the 1938 Compact confirm the reading that the signatory States intended to use the Rio Grande Project as the vehicle to guarantee delivery of Texas's and part of New Mexico's equitable apportionment of the stream, thereby supporting the finding that Texas has, in fact, stated a claim under the 1938 Compact. *See McCreary Cnty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 865 (2005); *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 589-90, 600 (2004).

The Rio Grande Project was the culmination of years of national and international problem-solving, litigation, legislation, and negotiation by irrigators, engineers, and politicians to irrigate lands in the Elephant Butte-Fort Quitman section of the Upper Rio Grande Basin. *See* discussion *supra* Part III.B-D. By the late 1920s, the number of acres irrigated below Elephant Butte Reservoir through Reclamation's administration of the Rio Grande Project totaled approximately 88,000 in New Mexico and 67,000 in Texas. *See* RIO GRANDE JOINT INVESTIGATION, at 74-75.

Even as the idea formed in 1924 for a commission to address the 1896 embargo in Colorado and "draft a form of compact between the States affected under which an equitable allocation of the use of the waters of the Rio Grande would be made," 66 CONG. REC. 591 (1924), representatives from New Mexico accepted then – as they do now – that Texas receives its water through Reclamation's administration of the Rio Grande Project, *see, e.g.*, Transcript of First Meeting

of Rio Grande River Compact Commission 11 (Oct. 26, 1924), http://dspace.library.colostate.edu; Hr'g Tr. 38:20-23, Aug. 19, 2015 (SM R. Doc. 37) ("The means by which the Texas water is delivered to the territorial jurisdiction of Texas is the Rio Grande Project."). The 1929 Interim Compact represented the intent to protect the status quo on the stream while Colorado received federal funding to capture and store water from the Closed Basin (which was not tributary water) so that eventually a "fair adjustment" of the Rio Grande among the States could be assigned through a permanent compact. Dec. 1934 Rio Grande Compact Comm'n Proceedings, at 6; *see also* Mar. 1937 Rio Grande Compact Comm'n Proceedings, at 3 ("[New Mexico's] idea of the [1929 Interim Compact] was more or less status quo of conditions on the river; to hold in that condition until some permanent compact could be drawn up which there could be equitable distribution of the waters.") (**DVD Doc. 4**). That commitment to maintain the status quo pending a permanent compact protected the apportionments of water below Elephant Butte made by Reclamation through the Rio Grande Project. *See* 1929 Interim Compact, 46 Stat. 770, 772 (stating in Articles V and XII that neither Colorado nor New Mexico would "cause or suffer the water supply of Elephant Butte Reservoir to be impaired by new or increased diversion or storage within the limits of each state unless and until such depletion is offset by increase of drainage return").

In September 1937, when the Rio Grande Compact Commission convened to review the *Rio Grande Joint*

Investigation and begin negotiations for a permanent compact, Colorado's written position as to Texas's equitable apportionment under a compact imported the "conditions obtaining on the river" at the signing of the 1929 Interim Compact, which included the operation of the Rio Grande Project and the allocation and distribution of water downstream of Elephant Butte Reservoir by Reclamation. Sept. 1937 Rio Grande Compact Comm'n Proceedings, at 10, 54 (**DVD Doc. 5**). Likewise, New Mexico also equated Texas's equitable apportionment of the Rio Grande with what it receives via the Rio Grande Project: "New Mexico is willing to negotiate with the State of Texas as to the right to the use of water claimed by citizens of Texas under the Elephant Butte Project on the basis of fixing a definite amount of water to which said project is entitled." *Id.* at 12, 59. Although Texas wanted to benefit more from the upstream States' future reclamation projects, it agreed that its allocation would be tied to the amount released by Reclamation in its administration of the Rio Grande Project. *Id.* at 13, 60. Once the States agreed on that premise, the debate turned to the details of scheduling water deliveries to be made by the upstream States. *See id.* at 32-34, 61-65.

After working with their engineer advisers to forge delivery schedules, each Commissioner of the Rio Grande Compact Commission appointed two legal advisers to represent each State's interest and "to prepare a tentative draft [of a compact] which will incorporate in substance the report of the engineers and provide administrative machinery." Mar. 1938 Rio

Grande Compact Comm'n Proceedings, at 31 (**DVD Doc. 8**). Notably, the Texas Commissioner appointed to advocate for Texas's interests counsel for each of the two irrigation districts served by the Rio Grande Project: El Paso County Water Improvement District No. 1 and the Elephant Butte Irrigation District, *see id.* at 31, as "from both the legal and practical standpoint there is an identity of interests," May 1938 Lower Rio Grande Water Users Meeting Proceedings, at 11 (**DVD Doc. 14**).

After the 1938 Compact was signed by the Commissioners, ratification proved difficult in Texas, owing to some confusion regarding the 1938 Compact's apportionment of water to Texas. To clarify that issue, a Texas attorney representing a water district downstream of lands irrigated by the Rio Grande Project wrote to Frank Clayton, the Rio Grande Compact Commissioner from Texas:

> I do not find anything in the compact, however, which ties down and limits the use or division of the waters according to present usage and physical conditions, and nothing that would prevent controversy between the two States in the future regarding the division of the waters between the two States.
>
> This omission is too obvious to have been inadvertent and, therefore, unquestionably, the Commissioners had what they considered a valid reason for it. On behalf of a number of interested parties in this area, I would appreciate it very much if you would advise me why

> the respective rights of Texas and New Mexico to these waters were not defined and provided for in the compact in express terms.

Sept. 1938 Sawnie Smith Letter (**DVD Doc. 25**). In response, Frank Clayton answered:

> It was decided prior to the signing of the temporary compact that New Mexico's obligations as expressed in the compact must be with reference to deliveries at Elephant Butte reservoir, and this provision was inserted in the temporary compact. . . .
>
> The Rio Grande Project, as you know, is operated as an administrative unit by the Bureau of Reclamation, and the dam and releases from the reservoir are controlled by the Bureau and will continue to be at least until the federal government is repaid its investment, and very probably even beyond that time. . . .
>
> . . . .
>
> [T]he question of the division of the water released from Elephant Butte reservoir is taken care of by contracts between the district under the Rio Grande Project and the Bureau of Reclamation. These contracts provide that the lands within the Project have equal water rights, and the water is allocated according the areas involved in the two States. By virtue of the contract recently executed, the total area is "frozen" at the figure representing the acreage now actually in cultivation: approximately 88,000 acres for the Elephant

> Butte Irrigation District, and 67,000 for the El Paso County Water Improvement District No. 1, with a "cushion" of three per cent. [sic] for each figure.

Oct. 1938 Frank Clayton Letter (**DVD Doc. 26**).

It is plain that the Commission fully relied upon the existing Rio Grande Project to impart Texas's and lower New Mexico's respective equitable apportionments of Rio Grande waters. Even today, New Mexico does not object to that conclusion: "We don't have any serious argument that the compact incorporates a 43 percent [of Project water] to Texas, 57 percent to New Mexico scheme, with 60,000 off the top for Mexico, as a part of the understanding of the compact." Hr'g Tr. 40:6-9, Aug. 19, 2015 (SM R. Doc. 37). In light of the fact that the 1938 Compact was negotiated "in the shadow [of the Supreme Court's] equitable apportionment power," *Kansas v. Nebraska*, 135 S. Ct. 1042, 1052 (2015) – indeed, Texas had just filed suit against New Mexico in 1935 claiming violations of the 1929 Interim Compact, *see* Part III.F.2 & n.43 – it is unfathomable to accept that Texas "would trade away its right to the Court's equitable apportionment," *Kansas*, 135 S. Ct. at 1052, had it contemplated then that New Mexico would be able to disown its obligations under the 1938 Compact and simply recapture water it delivered to the Project, destined for Texas, upon its immediate release from the Reservoir.

D. Application of the Supreme Court's Doctrine of Equitable Apportionment Also Prohibits New Mexico from Recapturing Project Water After That Water Is Released from the Elephant Butte Reservoir Through the Administration of the Rio Grande Project

An interstate stream used beneficially in each State through which it passes is considered to be "more than an amenity, [but rather] a treasure [that] offers a necessity of life that *must be rationed* among those who have power over it." *New Jersey v. New York*, 283 U.S. 336, 342 (1931) (emphasis added); *see also Wyoming v. Colorado*, 259 U.S. 419, 466 (1922). Here, the Rio Grande rises in Colorado, flows through New Mexico and Texas, providing the border between Texas and Mexico, and then empties into the Gulf of Mexico. Therefore, all three States have power over the Rio Grande and each is entitled to an equitable apportionment thereof. And that is the goal they achieved in negotiating and ratifying the 1938 Compact. The preamble to the 1938 Compact unambiguously declares that, through the 1938 Compact, the signatory States intended to apportion equitably by compact all of the waters of the Rio Grande above Fort Quitman among the three States. *See* 1938 Compact, at 1; *see also supra* Part II.B (discussion of doctrine of equitable apportionment).

New Mexico concedes that Texas received an equitable apportionment of the Rio Grande waters through the 1938 Compact, *see* Hr'g Tr. 34:13-22, Aug. 19, 2015

(SM R. Doc. 37), and it concedes that the signatory States to the 1938 Compact allocated Texas's equitable apportionment to the Rio Grande Project, *see* Hr'g Tr. 35:13-36:12, Aug. 19, 2015 (SM R. Doc. 37); Mot. to Dismiss at 31-32. New Mexico, however, argues that the 1938 Compact imposes upon it no obligations to ensure that Rio Grande Project deliveries (*i.e.*, Texas's equitable apportionment) arrive at the New Mexico-Texas state line; therefore, New Mexico asserts that it may intercept and divert water leaving Elephant Butte Reservoir before it crosses the New Mexico-Texas state line because that water – and, indeed, the entire administration of the Rio Grande Project within New Mexico – is governed by New Mexico state water law. *See* Mot. to Dismiss at 37-63; *see also* Hr'g Tr. 31:11-12, Aug. 19, 2015 (SM R. Doc. 37) ("The compact does not prevent New Mexico from interfering with [P]roject water."). But New Mexico's argument regarding its duties under the 1938 Compact ignores the effect that equitable apportionment via compact has upon all other prior appropriations granted by state law. The equitable apportionment achieved by the 1938 Compact commits the water New Mexico delivers to Elephant Butte Reservoir to the Rio Grande Project; that water is not subject to appropriation or distribution under New Mexico state law.

In participating in the negotiation and ratification of the 1938 Compact as a quasi-sovereign, New Mexico "had power to bind by compact [its] . . . appropriators by division of the flow of the stream" in any way it saw

fit. *Hinderlider*, 304 U.S. at 108. At the time of the signing of the 1938 Compact, Reclamation had operated the Rio Grande Project for over twenty years, irrigating lands below Elephant Butte Reservoir in lower New Mexico and Texas, as well as delivering water to Mexico pursuant to the Convention of 1906, by releasing water from the Reservoir, the primary water-storage location for the Rio Grande Project. "To secure the greatest beneficial use of the water in the stream," *id.* (internal quotations omitted), the signatory States of the 1938 Compact utilized the existing Rio Grande Project as the vehicle by which Texas would receive its equitable apportionment of the Rio Grande waters, and, indeed, by which New Mexico would also receive a portion of its equitable apportionment. Not only does the negotiating history of the 1938 Compact support that assertion, *see* discussion *supra* Part III.E.-F., but today New Mexico recognizes that understanding as well, *see, e.g.*, Hr'g Tr. 38:18-23, 40:6-9, Aug. 19, 2015 (SM R. Doc. 37) ("The means by which the Texas water is delivered to the territorial jurisdiction of Texas is the Rio Grande Project. It is . . . the Texas apportionment. . . . We don't have any serious argument that the compact incorporates a 43 percent to Texas, 57 percent to New Mexico scheme, with 60,000 off the top for Mexico, as a part of the understanding of the compact."). Therefore, the Project water leaving Elephant Butte

belongs to either New Mexico or Texas by compact, or to Mexico by the Convention of 1906.[54]

The equitable apportionment of the Rio Grande as agreed upon in the 1938 Compact by Colorado, New Mexico, and Texas "is binding upon the citizens of each State and all water claimants, even where the State had granted the water rights before it entered into the compact." *Hinderlider*, 304 U.S. at 106. As New Mexico possesses the right only to its equitable share of the Rio Grande and cannot grant water rights in excess of that equitable share, "the apportionment made by the Compact can not have taken from [New Mexico's prior appropriators] any vested right." *Id.* at 108. That said, New Mexico, through its agents or subdivisions, may not divert or intercept water it is required to deliver pursuant to the 1938 Compact to Elephant Butte Reservoir after that water is released from the Reservoir by Reclamation for deliveries pursuant to the administration of the Rio Grande Project. That water has been committed by compact to the Rio Grande Project for delivery to Texas, Mexico, and lower New Mexico, and that dedication takes priority over all other appropriations granted by New Mexico.

Indeed, it may seem strange that New Mexico cannot intercept or divert even that portion of water that is delivered via the Rio Grande Project to lower New

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[54] This is not the only instance where equitable apportionment is premised upon the operation of a federal reclamation project and its distribution of water pursuant to contract, as the Court has recognized. *See Nebraska v. Wyoming*, 515 U.S. 1, 16-18 (1995).

Mexico water users comprising the Elephant Butte Irrigation District. But as one signatory State's high court has held: "If the water of [an interstate stream] becomes subject to equitable apportionment by compact, *the stream[ ] must be administered as mandated by compact. . . .*" *In re Rules & Regulations Governing the Use, Control, and Protection of Water Rights for Both Surface and Underground Water Located in the Rio Grande and Conejos River Basins and Their Tributaries*, 674 P.2d 914, 923 (Colo. 1983) (emphasis added). In *In re Rules & Regulations*, the Colorado Supreme Court dealt with a group of prior appropriators challenging the Colorado State Engineer's administration of the Conejos River and the main stem of the Rio Grande in strict accordance with the dual delivery schedules identified in the 1938 Rio Grande Compact. The prior appropriators argued that because the Conejos River had been considerably depleted through increased well-pumping, decreased snowpack runoff, and more efficient irrigation, the administration of the Conejos River pursuant to strict adherence to the schedules identified in the 1938 Compact created hardships for prior appropriators on the river and diminished their water rights. *Id.* at 920. Therefore, they argued that "a unitary state obligation, which would combine the delivery obligations of both streams as a total obligation for Colorado, to be reallocated in conjunction with the prior appropriation doctrine, best meets the constitutional and statutory prior appropriation doctrine." *Id.* at 922. Although the Colorado Legislature had passed a statute "which mandates that compacts which are deficient in provision for interstate

administration be implemented so as to 'restore lawful use conditions as they were before the effective date of the compact insofar as possible,'" *id.* at 923, the Colorado Supreme Court held that statute to be inapplicable, as "the separate delivery obligation is clear on the face of the compact," *id.* at 925. Therefore, the Colorado Supreme Court held that the State Engineer had no discretion to administer the Conejos River and Rio Grande's main stem differently in order to effect Colorado's deliveries under the 1938 Compact: "Although the impact of the Conejos River of separate delivery administration has been severe, particularly on the small farmers and ranchers who depend exclusively on a surface supply, the state engineer did not have any means of addressing that problem in the exercise of his compact rule power. . . ." *Id.*

Although New Mexico concedes "that Reclamation rather than the State of New Mexico is the entity with the power and duty to distribute the water after New Mexico delivers it into Elephant Butte Reservoir," Mot. to Dismiss at 38, it nevertheless argues that its state water law has been ignored:

> Texas' and the United States' reading of the Compact . . . transforms Article IV's requirement that New Mexico deliver water to Elephant Butte into a silent but sweeping relinquishment of New Mexico's sovereign authority to regulate the use of state waters in southern New Mexico and a complete disavowal of this Court's long-standing recognition of the primacy of state water law under Section 8 of the Reclamation Act.

Reply Br. at 14-15. But as discussed above, through the 1938 Compact, New Mexico itself, as a quasi-sovereign, relinquished its own rights to the water it delivers in Elephant Butte Reservoir, allocating the rights to that water instead to the Rio Grande Project to irrigate lands in Texas and lower New Mexico (and the Republic of Mexico pursuant to the Convention of 1906). New Mexico state law does not govern the distribution of the water apportioned by Compact. "Equitable apportionment, a federal doctrine, can determine times of delivery and sources of supply to satisfy that delivery without conflicting with state law, for state law applies only to the water which has not been committed to other states by the equitable apportionment." *In re Rules & Regulations*, 674 P.2d at 922 (citing *Hinderlider*, 304 U.S. 92, 106-08 (1938)). Therefore, any question of the rights of any signatory State to water apportioned by the 1938 Compact – including the rights to that portion of water mandated by compact to be delivered to lower New Mexico via the Rio Grande Project – must be decided pursuant to the original and exclusive jurisdiction of the Supreme Court. *See Hinderlider*, 304 U.S. at 110.

Moreover, New Mexico's statutes indicate that compliance with interstate compact deliveries is "imperative." *See, e.g.*, N.M. STAT. ANN. § 72-2-9.1(A); *see also* N.M. STAT. ANN. § 72-14-3.1(B)(6); *Montgomery v. Lomos Altos, Inc.*, 150 P.3d 971, 976 (N.M. 2006) (discussing rules promulgated by the Office of the State Engineer to ensure compliance with compacts, including the 1938 Compact). And the 1938 Compact

sufficiently dictates the method of its administration: the delivery of Texas's apportionment and lower New Mexico's apportionment must be made via Reclamation's administration of the Rio Grande Project. Therefore, New Mexico, like the Colorado State Engineer in *In re Rules & Regulations*, is without discretion to veer from the method of distribution of Project water after it leaves Elephant Butte Reservoir, as the 1938 Compact, by incorporating the Rio Grande Project, requires the water at that point be controlled and delivered to its destinations by Reclamation.

For the foregoing reasons, I recommend that the Supreme Court deny New Mexico's motion to dismiss the Complaint filed by Texas, as Texas has stated plausible claims for New Mexico's violation of the 1938 Compact.

V. New Mexico's Motion to Dismiss the United States' Complaint in Intervention

The Supreme Court granted leave to the United States on March 31, 2014, to intervene in these proceedings to protect federal interests related to the issues in this litigation. *See* 134 S. Ct. 1783 (2014). In its Complaint in Intervention, the United States alleges that "New Mexico has allowed the diversion of surface water and the pumping of groundwater that is hydrologically connected to the Rio Grande downstream of Elephant Butte Reservoir by water users who either do not have contracts with the Secretary [of the Interior] or are using water in excess of contractual amounts,"

in violation of federal reclamation law. Compl. in Intervention, ¶ 13. The United States also alleges that New Mexico's diversions below Elephant Butte Reservoir negatively interfere with the United States' contractual obligations to deliver water to its consumers, including its obligation pursuant to the Convention of 1906 to deliver water to Mexico. *Id.* ¶¶ 14-15. The United States seeks declaratory and injunctive relief, asking the Court: (i) to declare that New Mexico, as a party to the 1938 Compact, may not permit parties not in privity with the Bureau of Reclamation, as well as Rio Grande Project beneficiaries in New Mexico, to intercept or interfere with delivery of water from the Rio Grande Project; and (ii) to enjoin New Mexico from permitting such interception and interference. *Id.* at 5.

New Mexico moves to dismiss the United States' Complaint in Intervention for failure to state a claim under the terms of the 1938 Compact upon which relief can be granted. New Mexico asserts that it possesses no affirmative duty under the 1938 Compact to prevent interference with the United States' ability to fulfill long-standing obligations to deliver water pursuant to the Rio Grande Project. *See id.* at 59-61; *see also* Reply Br. at 14-15 ("Texas' and the United States' reading of the Compact . . . transforms Article IV's requirement that New Mexico deliver water to Elephant Butte into a silent but sweeping relinquishment of New Mexico's sovereign authority to regulate the use of state waters in southern New Mexico and a complete disavowal of this Court's long-standing recognition of the primacy of state water law under Section 8 of the Reclamation

Act."). And in the event that the Supreme Court dismisses Texas's Complaint for failure to state a plausible claim under the 1938 Compact (thereby removing the basis for the Court's original jurisdiction over the matter pursuant to 28 U.S.C. § 1251(a)), New Mexico argues that the Court should decline to extend its jurisdiction under § 1251(b)(2) and hear the United States' Complaint in Intervention as more appropriate venues exist in which the United States may assert its Project claims against New Mexico. *See* Mot. to Dismiss at 63-64.

As stated above, *see* discussion *supra* Part IV, the 1938 Compact utilizes the Rio Grande Project as the single vehicle by which to apportion the waters of the Rio Grande to Texas and New Mexico below Elephant Butte Reservoir, as well as to Mexico pursuant to the Convention of 1906.[55] The 1938 Compact also imposes duties upon Colorado to maintain scheduled deliveries to New Mexico, as well as upon New Mexico to maintain scheduled deliveries to the Project and to protect Project deliveries from Elephant Butte Reservoir to ensure that Texas and lower New Mexico receive their bargained-for apportionments of Rio Grande water. That said, however, the crux of the United States' claims against New Mexico in these proceedings is to assert its own Project water rights, obtained pursuant to the 1902 Reclamation Act (which requires compliance with state law to appropriate water for irrigation purposes), against unauthorized uses and to protect its

[55] The 1938 Compact expressly protects Project "deliveries to Mexico" made pursuant to the Convention of 1906. 53 Stat. 786.

ability to deliver Project water to its consumers as required by contract or by convention. *See* Compl. in Intervention, ¶¶ 13-15. As an initial matter, in evaluating whether the United States has stated a plausible claim under the 1938 Compact, I must determine whether the 1938 Compact confers upon the United States the right to assert federal reclamation law claims against quasi-sovereign New Mexico, as the United States itself is not a signatory to that compact and received no apportionment of Rio Grande water through the compact.

A. The United States' Litigation Roles Within Original Actions Resolving Interstate Stream Disputes

A review of the roles of the United States in original actions to apportion interstate streams or to enforce compacts or decrees apportioning those streams reveals that, historically, the United States has participated primarily as *amicus curiae*. *See, e.g.*, *Kansas v. Nebraska*, 562 U.S. 820 (2010) (inviting Acting Solicitor General to file briefs expressing views of the United States in a dispute regarding the enforcement of the Republican River Compact); *Montana v. Wyoming*, 550 U.S. 932 (2007) (inviting Solicitor General to file briefs expressing views of the United States in a dispute regarding the enforcement of the Yellowstone River Compact); *Wyoming v. Colorado*, 259 U.S. 419, 465 (1922) ("Here the complaining state [seeks] to have the common policy [of prior appropriation] which each [quasi-sovereign party] enforces within her limits applied in

determining their relative rights in the interstate stream. Nor is the United States seeking to impose a policy of its choosing on either state. All that it has done has been to recognize and give its sanction to the policy which each has adopted. Whether its public land holdings would enable it to go further we need not consider.").

On occasion, the United States has been granted leave to intervene as a party in original actions to apportion interstate streams among States; in those contexts, the United States intervenes to protect unique sovereign interests regarding federal reclamation projects or Native American relations. *See, e.g., Arizona v. California*, 373 U.S. 546 (1962). The case of *Nebraska v. Wyoming* provides useful instruction as to the scope of the United States' role both initially in an action to apportion the waters of an interstate stream, as well as the scope of its role in a subsequent action to enforce the decree or compact apportioning a stream.

In 1934, the State of Nebraska filed suit against the State of Wyoming,[56] invoking the original jurisdiction of the Supreme Court and asking the Court to settle disputes regarding alleged misappropriations of the North Platte River. The Court granted leave to the United States to intervene as a party defendant in that original action in order to assert its own rights to both

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[56] The State of Colorado was impleaded as a defendant in the proceedings and filed an answer with a cross-bill against Nebraska and Wyoming, requesting the Court to equitably apportion the North Platte River among the States. *See Nebraska v. Wyoming*, 325 U.S. 589, 591-92 (1945).

non-navigable, unappropriated water in the river, as well as its rights in water appropriated under federal reclamation law in its operation of federal reclamation projects on the river. *See* Brief for the United States of America, Intervenor at 14-18, *Nebraska v. Wyoming*, 1945 WL 48651 (Jan. 24, 1945) (No. 108, Original); *see also Nebraska v. Wyoming*, 304 U.S. 545 (1938) (granting United States leave to intervene). During the proceedings, the United States first asserted that its management of federal reclamation projects on the river would be jeopardized without recognition of its rights as owner of unappropriated water it claimed it had obtained under the 1902 Reclamation Act. *Nebraska v. Wyoming*, 325 U.S. 589, 615 (1945). Rejecting that argument, the Court challenged the United States' ownership of that unappropriated water:

> 'Although the government diverted, stored, and distributed the water, the contention . . . that thereby ownership of the water or water rights became vested in the United States is not well founded. Appropriation was made not for the use of the government, but, under the Reclamation Act, for the use of the landowners; and by the terms of the law and of the contract already referred to, the water rights became the property of the landowners, wholly distinct from the property right of the government in the irrigation works. . . . The government was and remained simply a carrier and distributor of the water with the right to receive the sums stipulated in the contracts as reimbursement for the cost of construction

> and annual charges for operation and maintenance of the works.'

Id. at 614 (quoting *Ickes v. Fox*, 300 U.S. 94, 95 (1937)). In denying the United States its own allocation of the unappropriated waters of the North Platte River, the Court noted:

> We do not suggest that where Congress has provided a system of regulation for federal projects it must give way before an inconsistent state system [that, for example, regulates the charges which the owners of canals or reservoirs may make for the use of water]. We are dealing here only with an allocation, through the States, of water rights among appropriators. The rights of the United States in respect to the storage of water are recognized. So are the water rights of the landowners. To allocate those water rights to the United States would be to disregard the rights of the landowners. To allocate them to the States, who represent their citizens parens patriae in this proceeding, in no wise interferes with the ownership and operation by the United States of its storage and power plants, works, and facilities. Thus the question of the ownership by the United States of unappropriated water is largely academic so far as the narrow issues of this case are concerned.

Id. at 615-16.

The Court further held that the United States was not entitled to its own separate allocation of water

even as the mere possessor of federal reclamation project water:

> The Special Master concluded that the position of the United States or the Secretary of the Interior is that of an appropriator of water for storage under the laws of Wyoming and that its interests are represented in that connection by Wyoming. That was in line with the ruling of this Court when Wyoming moved to dismiss this very case on the ground, among others, that the Secretary of the Interior was a necessary party. [*See Nebraska v. Wyoming*, 295 U.S. 40, 43 (1935).] The Court said: 'The bill alleges, and we know as a matter of law, that the Secretary and his agents, acting by authority of the Reclamation Act and supplementary legislation, must obtain permits and priorities for the use of water from the state of Wyoming in the same manner as a private appropriator or an irrigation district formed under the state law. His rights can rise no higher than those of Wyoming, and an adjudication of the defendant's rights will necessarily bind him. Wyoming will stand in judgment for him as for any other appropriator in that state. He is not a necessary party.' We have discussed the procedure of appropriation which has been followed in this region. The Secretary of the Interior made the appropriations under Wyoming law. But we have noted that the water rights were adjudicated to be in the individual landowners. Hence, so far as the water rights are concerned, *we think it is not proper to analogize this case to one where the United*

> *States acquires property within a State and asserts its title against the State as well as others.*

Id. at 629 (emphasis added). The United States finally pressed that "it is at least entitled to be recognized as the owner of the [project] storage water with full control over its disposition and use under Wyoming law." *Id.* at 629-30. The Court, recognizing the truth of that assertion under Wyoming law, held that:

> The decree which is entered will in no way cloud such claim as it has to storage water under Wyoming law; nor will the decree interfere with the ownership and operation by the United States of the various federal storage and power plants, works, and facilities. We repeat that the decree is restricted to an apportionment of the natural flow.

Id. at 630. The Court then proceeded to resolve the disputes among Nebraska, Wyoming, and Colorado by issuing a decree in 1945 apportioning the natural flow of the North Platte River (but not water stored in federal reclamation projects) among those States. *See id.* at 620-57.[57]

Over forty years after the Court issued its decree in *Nebraska v. Wyoming* apportioning the North Platte River, Nebraska petitioned the Court in 1986 to reopen

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[57] The Court modified the 1945 decree in 1953 to address issues raised by the United States' construction of another reservoir on the river. *See Nebraska v. Wyoming*, 345 U.S. 981 (1953).

the case to enforce the 1945 decree as against Wyoming. Nebraska asserted no claims against the United States.[58] Wyoming, however, asserted a cross-claim against the United States for declaratory and injunctive relief, alleging that federal mismanagement of reservoirs on the North Platte River in contravention of state and federal law as well as contracts governing water supply to individual users had the effect of interfering with Wyoming's apportionment of water as rationed by the Supreme Court's 1945 decree. 515 U.S. 1, 15 (1995).

In opposition to Wyoming's motion to amend its claims to include the cross-claim, the United States argued, in part, that Wyoming did not state a cognizable claim under the 1945 decree, as "the decree expressly refrained from apportioning storage water." *Id.* The Special Master found that "'even though the decree did not apportion storage water, it was framed based in part on assumptions about storage water rights and deliveries,' and [recommended] that therefore 'Wyoming should have the opportunity to go forward with her claims that the United States has violated the law and contracts rights and that such violations have the effect of undermining Wyoming's apportionment.'" *Id.*

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[58] According to the Special Master appointed by the Court, "[t]he United States was an intervenor in the original proceedings leading to the 1945 Order and Decree and . . . remained as a party in the current proceedings." Second Interim Rep. on Motions for Summary Judgment and Renewed Motions for Intervention at n.4, Nebraska v. Wyoming (Apr. 9, 1992) (No. 108, Original), http://www.supremecourt.gov/SpecMastRpt/SpecMastRpt.aspx.

at 16 (quoting the Special Master's Third Interim Report). The Court agreed, explaining:

> The availability of storage water and its distribution under storage contracts was a predicate to the original apportionment decree. Our 1945 opinion expressly recognized the significance of storage water to the lands irrigated by the pivotal reach, noting that over the prior decade storage water was on average over half of the total supply and that over 90 percent of the irrigated lands had storage rights as well as rights to natural flow. . . .
>
> . . . [W]e anticipated that the storage supply would be left for distribution in accordance with the contracts which govern it. In doing so, we were clearly aware of the beneficial use limitations that govern federal contracts for storage water [including § 8 of the Reclamation Act of 1902]. . . .
>
> Under this system, access to water from storage facilities was only possible by a contract for its use, and apportionment of storage water would have disrupted that use. . . . But although our refusal in 1945 to apportion storage water was driven by a respect for the statutory and contractual regime in place at the time, we surely did not dismiss storage water as immaterial to the proper allocation of the natural flow in the pivotal reach. And while our decree expressly protected those with rights to storage water, it did so on the condition that storage water would continue to be

> distributed in accordance with lawful contracts.

Id. at 17-18 (internal quotation and citations omitted). Despite the fact that the United States was not awarded its own water allocation in the 1945 decree of the Court and argued that the decree, therefore, afforded no causes of action against it, the Court held that because "Wyoming argue[d] only that the cumulative effect of the United States's failure to adhere to the law governing the contracts undermines the operation of the decree," it had "state[d] a claim arising under the decree itself, one by which it [sought] to vindicate its quasi-sovereign interests." *Id.* at 20 (internal quotations and citations omitted).

The United States' role in the 1986 enforcement action of the 1945 decree extended only to its defense of quasi-sovereign Wyoming's cross-claim against it. It asserted no cross-claims against any quasi-sovereign – indeed, given its argument that the 1945 decree afforded Wyoming no cognizable claim against the United States regarding its administration of federal reclamation projects on the North Platte River because the decree did not apportion water to the United States, the United States may have been hard-pressed to use the 1945 decree in turn as the basis by which to assert claims of misappropriation of project water or interference with federal reclamation contracts connected to its administration of federal reclamation projects on the river.

B. The 1938 Compact Does Not Transform the United States' Federal Reclamation Claims into Compact Claims By Virtue of Its Utilization of the Project to Effect the Apportionment of Rio Grande Waters to Texas and New Mexico

Given the foregoing guidance and precedent, I turn to the examination of the 1938 Compact and whether that agreement affords the United States, a non-signatory, any cognizable claim against quasi-sovereign New Mexico. For the first time in its history of litigating within original actions to apportion interstate streams among States or to enforce compacts or decrees apportioning those streams, the United States here has intervened as a *party plaintiff*, alleging as the basis for its claims against New Mexico that it "has a *right protected by the Compact* to deliver Project water to contract holders in both [New Mexico and Texas] in accordance with irrigation demands, and to Mexico." U.S. Opp. Mot. to Dismiss at 25 (emphasis added). Specifically, the United States argues that "[t]he United States has a claim under the Compact because the Compact incorporates the Project and designates the '[u]sable water' in project storage as water that is 'available for release in accordance with irrigation demands, including deliveries to Mexico.'" *Id.* at 52 (citing Art. I(*l*), 53 Stat. 786).

But the 1938 Compact is an agreement among three quasi-sovereign States to apportion the Rio Grande – to which each has an equitable right – among themselves. The United States is not a signatory to the

1938 Compact – indeed, it received no apportionment of Rio Grande water through the compact. The United States has no claim itself to the natural flow of an interstate stream, as does a State through which the stream passes. *See New Jersey v. New York*, 283 U.S. 336, 342 (1931); *Wyoming v. Colorado*, 259 U.S. 419, 466 (1922). The Supreme Court's characterization in 1945 of the United States' ownership of any part of an interstate stream in the context of its administration of a federal reclamation project is as accurate here today as it was then: After the Desert Land Act effected a severance of all waters upon the public domain and made free for appropriation for a beneficial use all unappropriated water, the 1902 Reclamation Act granted the United States the opportunity to appropriate that water in accordance with state law for the purpose of building and administering federal reclamation projects. *See Nebraska v. Wyoming*, 325 U.S. 589, 613 (1945). The United States then contracted with individual water users, and later irrigation districts, for the use of project water. *Id.* The United States here obtained the water rights on which the Rio Grande Project rests in compliance with New Mexico state law pursuant to the 1902 Reclamation Act. "Pursuant to that procedure individual landowners have become the appropriators of the water rights, the United States being the storer and the carrier." *Id.* at 615.

The fact that the three signatory States to the 1938 Compact chose to use the Rio Grande Project, which had been in operation for years prior to the

negotiation and signing of the compact, as the sole vehicle by which to apportion Rio Grande waters to Texas and New Mexico below Elephant Butte Reservoir does not give the United States a right of action under the 1938 Compact. Applying the holding of the Court in the 1986 enforcement action in *Nebraska v. Wyoming* allowing Wyoming's cross-claim against a non-party to the 1945 decree to proceed, I find that, here, in order to state a claim under the 1938 Compact itself, the United States would have to assert "violations [which] have the effect of undermining [its own] apportionment [of water]." *Nebraska v. Wyoming*, 515 U.S. 1, 16 (1995). The 1938 Compact apportions no water to the United States; therefore, the United States cannot state a claim under the compact against New Mexico.

C. The Court Should Nevertheless Exercise Its Discretion to Extend Its Original, But Not Exclusive, Jurisdiction Under 28 U.S.C. § 1251(b)(2) to Hear the United States' Project Claims Against New Mexico

Despite the fact that the United States is prohibited as a non-signatory to the 1938 Compact from asserting claims under that compact, it nevertheless has stated a plausible claim against New Mexico under federal reclamation law:

> The United States . . . has a distinct interest in ensuring that water users who either do not have contracts with the Secretary of

> the Interior under the Project, or who use water in excess of contractual amounts, do not intercept or interfere with release and delivery of Project water that is intended for Project beneficiaries or for delivery to Mexico. . . .

United States Mot. for Leave at 2; *see also* Compl. in Intervention, ¶¶ 8, 12, 13, 14, 15.

Under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007), to evaluate a motion to dismiss under Rule 12(b)(6), I must assume as true the United States' allegation that "New Mexico has allowed the diversion of surface water and the pumping of groundwater that is hydrologically connected to the Rio Grande downstream of Elephant Butte Reservoir by water users who either do not have contracts with the Secretary or are using water in excess of contractual amounts." Compl. in Intervention, ¶ 13. Federal reclamation law has long established that only entities having contracts with the United States may receive deliveries of water from a reclamation project, *see, e.g.*, 43 U.S.C. §§ 423d, 423e, 431, 439, 461, and that requirement of a contract for project water extends to seepage and return flows, which are included as project water in federal reclamation projects. *See Bean v. United States*, 163 F. Supp. 838 (Ct. Cl. 1958) (citing *Ide v. United States*, 263 U.S. 497, 505 (1924)).

Because the United States does not have a right to assert claims against New Mexico under the 1938 Compact, its claims cannot be properly resolved by the Supreme Court pursuant to its original and exclusive

jurisdiction, which is reserved for resolution of "controversies between two or more states." 28 U.S.C. § 1251(a). But the United States can nevertheless properly assert its claims against New Mexico in the Supreme Court, invoking the Court's original, but not exclusive, jurisdiction pursuant to § 1251(b)(2), which is reserved for "controversies between the United States and a State."[59] The Court has previously indicated that it will exercise its jurisdictional grant under § 1251(b)(2) over suits brought by the United States against a state in "appropriate circumstances," but only "sparingly"; moreover, it is "particularly reluctant to take jurisdiction of a suit where the plaintiff has another adequate forum." *Maryland v. Louisiana*, 451 U.S. 725, 744 (1981). In *Maryland v. Louisiana*, several States challenged Louisiana's "First-Use Tax" on natural gas brought into Louisiana from elsewhere, including from the Outer Continental Shelf ("OCS"). *Id.* at 728. In accepting the Special Master's recommendation to permit the United States to intervene, the Court found that a suit in a district court "would not include the plaintiff States," and thus "would be an inadequate forum in light of the present posture of the case." *Id.* at 744. Additionally, the Court reasoned that "the interests of the United States in protecting its rights in the OCS area, with ramifications for all

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[59] The United States acknowledged and invoked this basis for jurisdiction in the Brief of the United States in Opposition to New Mexico's Motion to Dismiss Texas's Complaint in Intervention, filed June 2014, at 1; at 51-52; and during oral argument. *See* Hr'g Tr. 98:7-11, Aug. 19, 2015 (SM R. Doc. 37).

coastal States, as well as its interests under the regulatory mechanism that supervises the production and development of natural gas resources," made the case appropriate for the exercise of § 1251(b)(2) jurisdiction. *Id.* at 744-45.

I have recommended that the Court deny New Mexico's motion to dismiss Texas's Complaint, as Texas has alleged plausible claims under the 1938 Compact. If the Court affirms that recommendation, I recommend that the Court extend its original jurisdiction under § 1251(b)(2) to consider and resolve the claims made in the United States' Complaint in Intervention concurrently with those made by Texas for purposes of judicial economy. The resolution of the 1938 Compact claims made by Texas and the federal reclamation law claim made by the United States involve the same parties, discovery of the same facts, and examination of similar, if not identical, issues. Indeed, Texas's Complaint prays that the Court should order New Mexico to "cease and desist all actions which interfere with and impede the authority of the United States to operate the Rio Grande Project." Compl. at 16.

Furthermore, whether the Court affirms or rejects my recommendation to deny New Mexico's motion to dismiss Texas's Complaint, resolution of the United States' claims by the Court is nevertheless desirable due to the interstate nature of the Rio Grande Project. In moving to dismiss the United States' Complaint in Intervention, New Mexico argues that the United States should simply "invoke the authority of the New

Mexico State Engineer under state law" and make a call on the river as a senior appropriator to prioritize its claims to Rio Grande waters on behalf of the Rio Grande Project. Mot. to Dismiss at 62. That recourse, however, works best only to resolve intrastate water use disputes. For example, the United States recently made a priority call in order to regulate or prioritize water rights for the benefit of the Klamath Project, a federal reclamation project serving Oregon and California, but, importantly, that process worked because the call was made to regulate only water users within a particular state; the alleged misappropriations did not affect the apportionment made by the governing compact between Oregon and California or any other interstate obligations. *See* Hr'g Tr. 99:6-25, 101:11-19, Aug. 19, 2015 (SM R. Doc. 37). Therefore, resolution of an entirely intrastate issue was appropriately resolved under that State's law by the State Engineer.

But the United States' claims here involve more than "competing claims to water within a single State," over which the Court has expressed reluctance to exercise its original jurisdiction. *See United States v. Nevada & California*, 412 U.S. 534, 538 (1973).[60] As

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[60] I add that the primary reason the Court declined to grant the United States' motion for leave to file a bill of complaint seeking a declaration of the rights of the States and of the United States in the Truckee River is because, after the United States filed its motion, the States of California and Nevada entered into a compact apportioning the river on behalf of all appropriators and providing for the rights of the United States, thereby mooting the controversy. *See United States v. Nevada & California*, 412 U.S. 534, 538-39 (1973). The Court denied the motion without prejudice so that the United States could refile its motion "should the

explained by the United States, "the [Rio Grande] project operates as a whole and has interstate obligations," Hr'g Tr. 98:12-13, Aug. 19, 2015 (SM R. Doc. 37); indeed the Rio Grande Project has international obligations as well, as the Project is required to fulfill the United States' treaty obligations to Mexico regarding the delivery of Rio Grande waters. Unlike the allegations regarding the Klamath Project, both Texas and the United States allege that the misappropriations of water by New Mexico through her agents and citizens affect and diminish the 1938 Compact's apportionment of water to Texas and, possibly, to Mexico. Because other sovereigns have significant interests in the resolution of the United States' project claims, it would be inappropriate to allow the New Mexico State Engineer to resolve those claims.[61] I submit that those claims are best resolved by this Court in light of the various other interstate and international obligations and interests.

Therefore, based upon the standard of review for motions filed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, Supreme Court precedent,

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posture of the litigation change in a manner that presents a more substantial basis for the exercise of [the Court's] original jurisdiction." *Id.* at 540.

[61] Indeed, at one point, the New Mexico State Engineer agreed. *See United States v. City of Las Cruces*, 289 F.3d 1170, 1178 (10th Cir. 2002) (discussing a 1986 action filed to adjudicate water claims on the Rio Grande between Elephant Butte and the Texas state line and observing that the New Mexico State Engineer moved to dismiss the action, arguing that "the state court did not have personal jurisdiction over Project water users in Texas who were indispensable parties").

the pleadings filed by the parties, the oral arguments advanced by those parties, and for the reasons stated above, I recommend that the Court grant New Mexico's motion to dismiss the United States' Complaint in Intervention to the extent that the United States cannot state a plausible claim under the 1938 Compact; but to the extent that the United States has stated plausible claims under federal reclamation law on behalf of the Rio Grande Project, I recommend that the Court extend its original, but not exclusive, jurisdiction pursuant to 28 U.S.C. § 1251(b)(2) to allow for the resolution by the Court of the United States' project claims to occur simultaneously with the resolution of Texas's compact claims against New Mexico.

VI. Elephant Butte Irrigation District's Motion to Intervene

On December 3, 2014, Elephant Butte Irrigation District ("EBID") filed a motion for leave to intervene as a party to these proceedings. EBID is an "irrigation district and a New Mexico quasi-municipal corporation, duly incorporated and organized under New Mexico law, with its principal place of business in Dona Ana County, New Mexico." EBID Mot. to Intervene at 2. Its boundaries lie wholly within New Mexico. According to EBID, it "was created pursuant to a New Mexico statute authorizing organization of an irrigation district to cooperate with the United States under the federal reclamation laws in providing water supplies from the lower Rio Grande for irrigation of lands in southern New Mexico." *Id.; see also* N.M. STAT. ANN. § 73-10-16.

Essentially, EBID is contractually responsible to the United States to manage Rio Grande Project deliveries within New Mexico after Reclamation determines EBID's share of water pursuant to its administration of the Project. EBID Mem. in Support at 3-4, 20.

EBID is not a party to the 1938 Compact. Texas seeks no relief directly against EBID; EBID is not specifically mentioned in Texas's Complaint, other than the identification of EBID as "a political subdivision of the State of New Mexico [and] the Rio Grande Project beneficiary of water from the Rio Grande Project for delivery and use in southern New Mexico." Compl. ¶ 8. Similarly, the United States seeks no relief directly against EBID, and identifies EBID only as a contractual recipient of Rio Grande Project water. *See* Compl. in Intervention, ¶ 8. EBID nevertheless seeks leave to intervene as a party in this case, despite the fact that EBID's home state of New Mexico is already a party. EBID asserts that it has a unique and compelling interest in this case, one that is distinct from other New Mexico citizens, by virtue of its managerial role on behalf of the United States in administering the Rio Grande Project in New Mexico. *See* EBID Mem. in Support at 20-22.

On January 29, 2015, New Mexico, Texas, and the United States filed responses opposing EBID's motion; Colorado filed a limited response, refraining from either supporting or opposing EBID's motion, but purporting to reserve the right to file a response pending the outcome of the Court's decisions regarding New

Mexico's motion to dismiss.[62] On March 20, 2015, EBID submitted a reply brief in support of its motion and addressing the opposing responses. On April 27, 2015, the Supreme Court referred EBID's motion to intervene to me.

Counsel for movant EBID, as well as parties New Mexico, Colorado, Texas, and the United States presented oral argument at a hearing to consider the motion to intervene held in New Orleans, Louisiana, on August 20, 2015. Based upon the pleadings filed by the parties and the *amici curiae* as well as the oral arguments advanced by the parties, I recommend that the Court deny EBID's Motion for Leave to Intervene.

A. The Applicable Legal Standard for Intervention

The Supreme Court has established the standard governing intervention in an original action by a non-state entity: "An intervenor whose state is already a party should have the burden of showing some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state." *South Carolina v. North Carolina*, 558 U.S. 256, 266 (2010) (citing *New Jersey v. New York*, 345 U.S. 369, 373 (1953)). That high standard "is a necessary recognition of sovereign dignity, as well as a working rule

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[62] The basis upon which Colorado believes it can file a response after the motion to intervene is granted or denied is not clear.

for good judicial administration." *New Jersey*, 345 U.S. at 373.

Interstate water disputes, reserved to the "original and exclusive jurisdiction" of the Supreme Court, 28 U.S.C. § 1251(a), necessarily invoke States' sovereignty, with "each acting as a quasi sovereign and representative of the interests and rights of her people in a controversy with the other," *Wyoming v. Colorado*, 286 U.S. 494, 508-09 (1932). Indeed, "the parens patriae doctrine . . . is a recognition of the principle that the state, when a party to a suit involving a matter of sovereign interest, must be deemed to represent all citizens." *New Jersey*, 345 U.S. at 372 (internal quotations and citation omitted); *see also South Carolina*, 558 U.S. at 267 ("In its sovereign capacity, a State represents the interests of its citizens in an original action, the disposition of which binds the citizens."); *Nebraska v. Wyoming*, 515 U.S. 1, 21 (1995) ("A State is presumed to speak in the best interests of [its] citizens. . . .").

"A respect for sovereign dignity, therefore, counsels in favor of restraint in allowing nonstate entities to intervene in such disputes." *South Carolina*, 558 U.S. at 267 (citations omitted). "Otherwise, a state might be judicially impeached on matters of policy by its own subjects. . . ." *New Jersey*, 345 U.S. at 373. Thus, in resolving a motion to intervene in an original jurisdiction action, it is appropriate to assume, absent evidence to the contrary, that States will adequately and appropriately represent the interests of their citizens, and, specifically in this case, its citizen water users.

In addition to respecting States' sovereign dignity, the Supreme Court's standard for intervention in original actions also addresses more practical concerns, those of judicial economy and administration. As explained by the Supreme Court, "[s]uch [original] actions tax the limited resources of this Court by requiring us 'awkwardly to play the role of factfinder' and diverting our attention from our 'primary responsibility as an appellate tribunal.'" *South Carolina*, 558 U.S. at 267 (quoting *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 498 (1971) and *Maryland v. Louisiana*, 451 U.S. 725, 762 (1981) (Rehnquist, J., dissenting)). Without such a high standard for intervention in original actions, "there would be no practical limitation on the number of citizens . . . who would be entitled to be made parties." *New Jersey*, 345 U.S. at 373. Therefore, "[i]n order to ensure that original actions do not assume the 'dimensions of ordinary class actions,' . . . [the Supreme Court] exercise[s] [its] original jurisdiction 'sparingly' and retain[s] 'substantial discretion' to decide whether a particular claim requires 'an original forum in [the Supreme] Court.'" *South Carolina*, 558 U.S. at 267 (quoting *New Jersey*, 345 U.S. at 373 and *Mississippi v. Louisiana*, 506 U.S. 76, 76 (1992)).

"That the standard for intervention in original actions by nonstate entities is high, however, does not mean that it is insurmountable." *Id.* at 268. Intervention of nonstate entities is allowed "in compelling circumstances." *Id.* (citing *Oklahoma v. Texas*, 258 U.S. 574, 581 (1922)). For example, the Supreme Court allowed two nonstate entities to intervene in *South*

Carolina v. North Carolina, a case in which South Carolina filed an original action seeking an equitable apportionment of the Catawba River, an interstate stream shared by the Carolinas, holding that both proposed intervenors had satisfied the high standard for intervention articulated in *New Jersey v. New York*. *Id.* at 259. The first entity, Catawba River Water Supply Project ("CRWSP"), sought intervention as a party-defendant, arguing that its interest as a water user was not adequately represented by either State, due to the CRWSP's "interstate nature." *Id.* at 260. The Supreme Court allowed CRWSP's intervention, holding that CRWSP had carried its burden to intervene by showing the following compelling circumstances:

> The CRWSP is an unusual municipal entity, established as a joint venture with the encouragement of regulatory authorities in both States and designed to serve the increasing water needs of Union County, North Carolina, and Lancaster County, South Carolina. It has an advisory board consisting of representatives from both counties, draws its revenues from its bistate sales, and operates infrastructure and assets that are owned by both counties as tenants-in-common. We are told that approximately 100,000 individuals in each State receive their water from the CRWSP and that "roughly half of the CRWSP's total withdrawals of water from the Catawba River go to South Carolina consumers. It is difficult to conceive a more purely bistate entity.

> In addition, the CRWSP relies upon authority granted by both States to draw water from the Catawba River and transfer that water from the Catawba River basin. . . . [T]he complaint specifically identifies this transfer as contributing to South Carolina's harm.
>
> . . . .
>
> We are further persuaded that neither State can properly represent the interests of the CRWSP in this litigation. The complaint attributes a portion of the total water transfers that have harmed South Carolina to the CRWSP, yet North Carolina expressly states that it "cannot represent the interests of the joint venture." A moment's reflection reveals why this is so. In this dispute, as in all disputes over limited resources, each State maximizes its equitable share of the Catawba River's water only by arguing that the other State's equitable share must be reduced. . . . The stresses that this litigation would place upon the CRWSP threaten to upset the fine balance on which the joint venture is premised, and neither State has sufficient interest in maintaining that balance to represent the full scope of the CRWSP's interest.

Id. at 269-71 (internal citations omitted).

Similarly, in light of the "flexible process" requiring consideration of "all relevant factors" by which the Supreme Court "arrive[s] at a just and equitable apportionment of an interstate stream," the Supreme Court held that the second proposed intervenor, Duke

Energy Carolinas, LLC ("Duke Energy") had also carried its burden to intervene by showing the following compelling facts: (i) Duke Energy operated eleven dams and reservoirs spanning both States on the Catawba River pursuant to licensing by the Federal Energy Regulatory Committee ("FERC") and controlled the river's minimum flow into South Carolina, representing a unique interest apart from other citizens of either State party; and (ii) "Duke Energy ha[d] a unique and compelling interest in protecting the terms of its existing FERC license" and its renewal, which was governed by a Comprehensive Relicensing Agreement, an agreement which "represent[ed] the full consensus of 70 parties from both States regarding the appropriate minimum flow of Catawba River water into South Carolina under a variety of natural conditions." *Id.* at 271-73 (internal quotations and citations omitted). The Supreme Court concluded "that neither State sufficiently represent[ed] these compelling interests." *Id.* at 273.

B. EBID Has Not Met the Standard for Intervention

To justify its intervention in these proceedings, EBID asserts that it has a compelling interest in its own right, apart from the interests of other New Mexico citizens, because it "bears major responsibilities for managing the New Mexico portion of the Rio Grande Project, coordinating the delivery of the Texas portion of the Project water, and effectuating the congressional goal of protecting the integrity and feasibility of the

Rio Grande Project," purportedly making it "the only entity in this case that bears these major responsibilities and is not currently a party in this litigation." EBID Mem. in Support at 22. EBID further described its compelling interest during oral argument:

> [EBID] administers the Rio Grande Project in New Mexico. Elephant Butte, of course, was created under the laws of New Mexico for the purpose of cooperating with the United States in developing water supplies for the Rio Grande Project under the federal reclamation laws. So [EBID] is kind of a hybrid entity in the sense that it was created under New Mexico law but is created for the purpose of assisting and facilitating the development of a federal reclamation project authorized by Congress under the federal reclamation law.
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> In addition to that, and perhaps far more important, the United States has transferred the project facilities from itself to [EBID] after [EBID] repaid the costs of the project.

Hr'g Tr. 12:17-13:5, Aug. 20, 2015. EBID also argues that it has a compelling interest in this lawsuit because it "is a signatory to the 1938 contract that has historically apportioned Rio Grande Project water between New Mexico and Texas." Hr'g Tr. 16:18-21, Aug. 20, 2015. Citing the Supreme Court's descriptions of the 1902 Reclamation Act in *Nebraska v. Wyoming*, 325 U.S. 589 (1945) and *Ickes v. Fox*, 300 U.S. 82 (1937), EBID further asserts that its interests are different from other New Mexico citizen water users as only "the surface water users in New Mexico who receive Project

water deliveries for irrigation of their lands possess the 'beneficial interest' in the Project water's rights, and EBID represents these New Mexico water users." EBID Mem. in Support at 23.

Moreover, EBID asserts that the State of New Mexico does not properly represent EBID's interests in these proceedings because "New Mexico, although representing the interests of water users in New Mexico, including both Project and non-Project users, has no particular responsibility for ensuring the integrity and feasibility of the Project, and for ensuring that adequate Project water supplies reach users in the Project area in Texas." *Id.* at 24; *see also* Hr'g Tr. 18:12-19:3, Aug. 20, 2015. Finally, EBID argues not only that its interests "are not represented by the other parties in this litigation," EBID Mem. in Support at 27-29, but that it will assert different legal arguments than the parties, "which would help the Court to better understand the complicated issues raised in the case." *Id.* at 29. As EBID stated during oral argument:

> We argue that the compact itself does not apportion Rio Grande Project water or Rio Grande water itself between New Mexico and Texas.
>
> . . . .
>
> In our view, the apportionment is governed not by the compact but, rather, by the contracts that have been signed by the United States and the two water districts, particularly the 1938 contract that has historically apportioned the water.

Hr'g Tr. 20:14-16, 20:22-21:1, Aug. 20, 2015. That argument, according to EBID, "provides an additional basis for intervention." EBID Mot. to Intervene at 4.

1. EBID's motion to intervene is procedurally deficient

As an initial matter, it is unclear on the face of EBID's papers as to whether EBID seeks intervention in this matter as a plaintiff or defendant. EBID did not attach to its motion to intervene a proposed Complaint in Intervention or other pleading setting forth the claims or defenses for which intervention is sought. Supreme Court Rule 17.2 states that "[t]he form of pleadings and motions prescribed by the Federal Rules of Civil Procedure is followed[;] [i]n other respects, those Rules and the Federal Rules of Evidence may be taken as guides." Rule 24 of the Federal Rules of Civil Procedure requires that a motion to intervene "state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought." FED. R. CIV. P. 24(c).

EBID cites *South Carolina v. North Carolina*, 558 U.S. 256, 276 n.8 (2010), and *Arizona v. California*, 460 U.S. 605, 614 (1983), *supplemented by* 466 U.S. 144 (1984), for the proposition that Supreme Court Rule 17.2 "provides only that the [Federal Rules of Civil Procedure are] taken as a 'guide' in original actions," concluding that "Rule 17.2 does not require strict

compliance with FRCP Rule 24(c), including its requirement that a motion to intervene must include a 'pleading.'" EBID Reply Br. at 39.

But EBID's reliance on *South Carolina* and *Arizona* to conclude that it is not required to attach to its motion to intervene a Complaint in Intervention or other pleading setting forth the claim or defense for which intervention is sought is tenuous at best. In *South Carolina*, the Supreme Court cited Rule 17.2 to note that the Rule 24 standard for permissive intervention gave way to the heightened standard for intervention in original actions articulated in *New Jersey v. New York* when the nonstate's interests can be adequately represented by its home State. 558 U.S. at 276 n.8. In *Arizona v. California*, sovereign Native American tribes sought intervention to participate in an adjudication of their water rights commenced by the United States, without asserting new claims against the State parties. 460 U.S. at 614. Acknowledging that the Supreme Court's "own rules make clear that the Federal Rules are only a guide to procedures in an original action," the Supreme Court held that the Tribes satisfied the standards for Rule 24 permissive intervention. *Id.* Although the Supreme Court identifies in both cases the advisory nature of federal procedural rules in original actions, that is where the appositeness of those cases to EBID's failure to append a proposed Complaint In Intervention to its motion to intervene ends.

Circuits that have taken a lenient approach to the requirements of Rule 24(c) and approved intervention

motions without an attached pleading setting forth the claim or defense for which intervention is sought have done so "where the court was otherwise apprised of the grounds for the motion." *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 474 (9th Cir. 1992); *see also Massachusetts v. Microsoft Corp.*, 373 F.3d 1199, n.19 (D.C. Cir. 2004) (noting that "procedural defects in connection with intervention motions should generally be excused by a court" in the absence of a claim of inadequate notice of the grounds for the motion to intervene). With that practice in mind, I look to EBID's pleadings and its statements made during oral argument to determine its claims or defenses for which intervention is sought and to glean the status to which EBID desires to be accorded in these proceedings. Indeed, in declining to append a proposed Complaint in Intervention or other pleading to its motion to intervene, EBID assured that "the motion and brief fully apprised the Court and the parties of EBID's claims and arguments." EBID Reply Brief at 40.

That said, EBID's papers suggest it is adverse to Texas: "Texas' complaint should be dismissed because, contrary to Texas' theory, the Rio Grande Compact does not apportion Rio Grande water to Texas, or apportion such water based on 1938 conditions." EBID Mot. to Intervene at 5. And EBID continues: "[T]o the extent that the Compact was intended to protect Texas' rights in Rio Grande water . . . Texas should be permitted to amend its complaint" to reflect that "Texas' rights were to be protected by agreements between the

United States and [EBID and EPCWID] which allocated water between Rio Grande Project users in New Mexico and Texas." *Id.*; *see also* EBID Mem. in Support at 30-36.

EBID's papers also suggest that it may be adverse to its home State of New Mexico, arguing that New Mexico does not represent EBID's interests because their interests "diverge in . . . highly significant respects," in light of New Mexico's separate action against the United States and EBID, filed on December 20, 2011, in the United States District Court for the District of New Mexico; particularly, EBID asserts a divergence of positions from New Mexico: (i) "concerning the propriety and legality of the Operating Agreement"; (ii) "whether Rio Grande return flows that result from drainage and seepage belong to the Project or instead are public waters subject to appropriation under the laws of New Mexico"; and, more generally, whether (iii) "the dispute between Texas and New Mexico concerning the interpretation of the Compact and the proper allocation of Rio Grande water primarily involves principles of federal law rather than New Mexico law." EBID Mem. in Supp. at 24-26; *see also id.* at 36-39.[63]

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[63] EBID also opposes claims made by the United States: "[T]he United States' argument that it is entitled to recover 'hydrologically connected groundwater,' and that such groundwater belongs to the Project and is not available for appropriation under New Mexico law . . . is also misplaced." EBID Mem. in Supp. at 37-38.

Aside from its expressed dissatisfaction in its pleadings with the positions of both parties, EBID plainly stated during oral argument that it has no intention to assert claims against or seek relief from either New Mexico or Texas. *See* Hr'g Tr. 23:20-24, Aug. 20, 2015. Therefore, I find it difficult to determine the purpose for EBID's intervention in this lawsuit and recommend the Court deny the motion to intervene on that basis.

But even if EBID's motion to intervene survives its procedural deficiency, EBID has failed to meet its burden to justify intervention in this original case. Because EBID's home State of New Mexico is already a party to this action, EBID has "the burden of showing some compelling interest in [its] own right, apart from [its] interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state." *South Carolina v. North Carolina*, 558 U.S. 256, 266 (2010).

2. EBID fails to satisfy its burden to establish a compelling interest that is unlike the interests of other citizens of the State

Texas, New Mexico, and the United States all oppose EBID's motion to intervene on grounds that EBID has failed to establish that it has a compelling interest that is not adequately represented by the parties. Texas Opp. at 7-8; New Mexico Opp. at 10-11; United States Opp. at 9. Their arguments on this point are

persuasive. The Complaints filed by the State of Texas and the United States seek: (i) enforcement of the 1938 Compact, which equitably apportioned the waters of the Rio Grande among the three signatory State; (ii) a determination of the rights and duties of the signatory States under the 1938 Compact; and (iii) a determination of the rights of the United States on behalf of the Rio Grande Project and under the Convention of 1906.

EBID states that its compelling interest in this case stems from the fact that it "has entered into contracts with the United States, under which the United States provides the Project water supplies to EBID, which EBID then distributes to the agricultural users in New Mexico." EBID Mot. to Intervene, at 20. EBID states that it "has also entered into contracts with the United States and [the El Paso County Water Irrigation District No. 1] under which EBID operates and maintains diversion structures in the Rio Grande that divert water for both districts." *Id.* Thus, EBID argues, it "has significant responsibilities in effectuating the purposes of the Rio Grande Compact." *Id.* at 21. But, EBID asserts, it "is not a 'water user' similarly situated to other water users in New Mexico and Texas," as it "does not 'use' water at all." EBID Reply Br., at 16. "Rather, EBID administers the Rio Grande Project in New Mexico, and owns and operates the Project's distribution and drainage facilities in New Mexico." *Id.* Its status as an administrator of the Rio Grande Project, EBID asserts, affords it a compelling interest in this

case that is in a class unique from all other citizens or creatures in New Mexico. *Id.* at 17.

But it is actually the United States that has the ultimate right and responsibility to administer the Rio Grande Project. Only the United States possesses the right to divert and store Project water and determine how that water is allocated between EBID and El Paso County Water Improvement District No. 1 under federal reclamation law. Although the United States has transferred ownership of some appurtenant delivery structures to entrymen who have perfected their beneficial-use rights for irrigation under section 6 of the 1902 Reclamation Act, it has not transferred, and cannot transfer, ownership of its reservoirs or its right to divert, store, release, and reuse Rio Grande Project water without Congressional approval:

> Sec. 6. . . . [W]hen the payments required by this Act are made for the major portion of the lands irrigated from the waters of any of the works herein provided for, then the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior: *Provided, That the title to and the management and operation of the reservoirs and the works necessary for their protection and operation shall remain in the Government until otherwise provided by Congress.*
>
> . . . .

> Sec. 10. That the Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect.

Act of June 17, 1902, ch. 1093, 32 Stat. 388, 389-90 (codified as amended at 43 U.S.C. §§ 372-373, 498) (emphasis added).

Quite possibly, EBID actually has less of an interest in this case, if any interest at all, than any other affected Rio Grande water user or claimant in New Mexico. EBID does not possess the rights or responsibility under federal reclamation law to carry out the provisions of the Rio Grande Project – the United States has those. And EBID holds no beneficial-use interests; as EBID acknowledges in its papers, the individual entrymen who purchased the land under the Reclamation Act and repaid the United States for the construction and maintenance costs of the irrigation works and the right to use water hold the beneficial-use water rights. *See* EBID Mem. in Support, at 22-23. EBID confirmed during oral argument that it seeks to intervene "as an entity and not on behalf of the individual users." Hr'g Tr. 23:25-24:7, Aug. 20, 2015.

EBID nevertheless compares its "bistate" status to the two entities granted the right to intervene in *South Carolina v. North Carolina*:

> Since EBID administers the Project to ensure water deliveries not only to New Mexico

> but also to Texas and Mexico, and physically delivers Project water to users in Texas, EBID serves bistate interests and not solely intrastate interests in administering the Project. . . . In *South Carolina*, the Supreme Court granted intervention to two non-state entities, CRWSP and Duke Energy, because they served bistate interests. Since EBID serves bistate interests, *South Carolina* supports EBID's right to intervene.

Id. at 22 (internal citations omitted). But even if federal reclamation law or the 1938 Compact were to give EBID some compelling interest in this matter, EBID does not possess the "bistate" qualities that led the Supreme Court to allow CRWSP and Duke Energy to intervene in *South Carolina*. Unlike CRWSP, which was formed as a joint venture with the consent of the two State parties' regulatory agencies, was governed by an advisory board consisting of representatives from counties in both States, drew its revenue from bistate sales, and operated irrigation infrastructure owned by counties in two States, EBID is organized, funded, and governed solely under the laws of New Mexico, and owns and operates irrigation infrastructure located wholly in New Mexico. The "bistate" interests that EBID describes it serves are not actually "bistate"; rather, EBID has merely executed agreements with the United States and El Paso County Water Improvement District No. 1 to deliver Rio Grande Project water it receives from the United States within New Mexico to New Mexico water users and, at times, to provide

infrastructure serving as a pass-through for water destined for Texas. *See* Decl. of Gehrig "Gary" Lee Esslinger, ¶¶ 7, 10, 16-21.[64]

If this case were postured as a "water allocation" case – that is, if Texas had filed a petition requesting

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[64] As EBID explained during oral argument:

> How does Texas get their water? How do we ensure that Texas gets their water? We are the key player in that. We are, in fact, the de facto water master on this system through contract, conveyances from Congress. We are the one that takes the water from the initial release, take it down through.
>
> . . . .
>
> When we received title back, we realized that there were lands in Texas that they could not irrigate and there were lands in New Mexico that we could not irrigate. So we entered into a contract before the final deed was signed that would allow us to go back and forth between Texas and New Mexico, the El Paso district coming up into New Mexico to deliver where we couldn't do that. That's been in operation just prior to the deed being signed by the United States, because the United States wanted something in place that would make sure that that water would be able to be delivered out of state by each irrigation district. I don't know how much more bistate we can become than that.
>
> In answer to your question, I turned to my manager. We deliver to X thousand acres, and the size of those constituents can vary from one-acre tracts to 20-acre farms or 50-acre farms. So it's hard to know how many individuals, because we track by the thousands of acres. And I think in our brief we told you the six-unit – that we irrigate to approximately 6,000 acres in Texas. That number goes up and down depending upon the orders year by year.

Hr'g Tr. 54:11-16; 54:20-55:6, Aug. 20, 2015.

the Supreme Court to make a just and equitable apportionment of the Rio Grande – then perhaps EBID's position as owner and operator of irrigation infrastructure and deliverer of water to end users in New Mexico would accord it a more compelling interest in this action, as the Supreme Court did for Duke Energy's interests in *South Carolina v. North Carolina*. After all, in apportioning an interstate stream between States, the Supreme Court "exercise[s] . . . an informed judgment on a consideration of many factors to secure a just and equitable allocation." *Colorado v. New Mexico*, 459 U.S. 176, 183 (1982) (internal quotations and citations omitted). To make a well-informed apportionment, the Court considers all relevant factors, including

> physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, [and] the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former.

Id. (quoting *Nebraska v. Wyoming*, 325 U.S. 589 (1945)). Indeed, in equitably apportioning an interstate stream, "there is no substitute for the exercise of an informed judgment and [the Supreme Court] will not hesitate to seek out the most relevant information from the source best situated to provide it." *South Carolina v. North*

Carolina, 558 U.S. 256, 272 (2010) (internal quotations and citations omitted).

But equitable apportionment of the Rio Grande has already been achieved through the States and Congress's ratification of the 1938 Compact. This litigation among quasi-sovereigns asks the Supreme Court to interpret the 1938 Compact and define and enforce those quasi-sovereigns' rights under the 1938 Compact. Therefore, the special considerations justifying Duke Energy's intervention in *South Carolina* are not present here to afford the same invitation to EBID.[65] As it stands, I do not find that EBID has demonstrated a compelling interest that is unlike all other citizens and creatures of the State of New Mexico.

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[65] Nor are the conditions justifying the intervention of private pipeline companies in *Maryland v. Louisiana* present here. The Supreme Court in *Maryland* allowed the intervention of seventeen pipeline companies in a dispute challenging the constitutionality of a tax imposed by Louisiana on the "first use" of any gas imported into Louisiana not already subject to state or federal taxation because, "[g]iven that the Tax is directly imposed on the owner of imported gas and that the pipelines most often own the gas, those companies have a direct stake in this controversy. . . ." 451 U.S. 725, 745 n.21 (1981). EBID's status as a statutory creature of New Mexico contracted to assist the United States in administering the Rio Grande Project in New Mexico affords it no direct stake in this case, which does not concern the administration of the Rio Grande Project or prioritization of the rights of individual water users on the stream.

3. EBID has not rebutted the presumption that New Mexico adequately represents EBID's interests in this litigation

Texas, New Mexico, and the United States all oppose EBID's motion to intervene on grounds that New Mexico adequately represents EBID's interests. Texas Opp. at 10; New Mexico Opp. at 19; United States Opp. at 10. Again, their arguments are persuasive. Compact enforcement actions, such as the one here, are "of such general public interest" that the signatory States to the 1938 Compact are "proper plaintiffs" and, thus, able to invoke the Supreme Court's original jurisdiction. *Texas v. New Mexico*, 482 U.S. 124, 133 n.7 (1987).[66] EBID, by its own admission, is wholly a creature of the State of New Mexico; therefore, pursuant to the doctrine of *parens patriae* and Supreme Court precedent, New Mexico, as a proper party in interest to this original jurisdiction case, is presumed to represent properly EBID's interests in these proceedings. *See South Carolina*, 558 U.S. at 267; *Nebraska v. Wyoming*,

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[66] Indeed, the text of the Eleventh Amendment bars a direct action by citizens against a sovereign State; therefore, "a State may not invoke [the Supreme Court's] original jurisdiction when it is merely acting as an agent or trustee for one or more of its citizens." *Kansas v. Colorado*, 533 U.S. 1, 7 (2001); *see also South Carolina v. North Carolina*, 558 U.S. 256, 277-78 (2010) (Roberts, C.J., concurring in the judgment in part and dissenting in part) ("Original jurisdiction is for the resolution of *state* claims, not private claims. To invoke that jurisdiction, a State 'must, of course, represent an interest of her own and not merely that of her citizens or corporations.'" (quoting *Arkansas v. Texas*, 346 U.S. 368, 370 (1953)).

515 U.S. 1, 21 (1995); *Wyoming v. Colorado*, 286 U.S. 494, 508-09 (1932). Even if EBID were to show a compelling interest unique from other citizens and creatures of New Mexico, it has not rebutted the presumption that New Mexico will adequately represent EBID's interests in this case.

EBID is not a party to the 1938 Compact. The 1938 Compact does not apportion Rio Grande water to EBID and does not impose delivery obligations on EBID. Indeed, the 1938 Compact's "apportionment is binding upon all citizens of each State and all water claimants, even where the State had granted the water rights before it entered into the compact." *Hinderlider v. La Plate River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106 (1938). But EBID conflates its interests with that of the United States when it states that, because "EBID was created for the purpose of 'cooperating' with the United States in developing Rio Grande Project water supplies for irrigation of lands situated along the Rio Grande in New Mexico," then "EBID's statutory mission is to ensure the integrity and feasibility of the Project, which serves water users in both New Mexico and Texas." EBID Mem. in Support, at 24. In arguing that New Mexico cannot or will not adequately represent EBID's interests in this litigation, EBID incorrectly asserts that "New Mexico, although representing the interests of water users in New Mexico, including both Project and non-Project users, has no particular responsibility for ensuring the integrity and feasibility of

the Project, and for ensuring that adequate Project water supplies reach users in the Project area in Texas." *Id.*

Putting aside the fact that this case centers on the determination of the respective rights and duties of the signatory States under the 1938 Compact and a determination of the rights of the United States on behalf of the Project and the Convention of 1906, EBID's "statutory mission" proceeds directly from the State of New Mexico. EBID concedes it is incorporated pursuant to the laws of New Mexico and is governed by those laws. *See* EBID Mot. to Intervene, at 2; *see also* N.M. STAT. ANN. §§ 73-10-1 to -50.[67] As it explained during oral argument:

> [EBID] operates within the control of the State of New Mexico. New Mexico passed a statute some time ago, obviously, that authorized [EBID] to participate with the United States and cooperate with the United States in operating the project for various functions.
>
> Certainly the New Mexico legislature would have the right, I suppose . . . I assume the New Mexico legislature would have the

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[67] Section 73-10-16 grants EBID's board of directors the right to "enter into any obligation or contract with the United States for the construction, operation, and maintenance of the necessary work for the delivery and distribution of water" from federal reclamation projects or "the board may contract with the United States for water supply under any act of congress providing for or permitting such contract."

> right to step in and terminate [EBID] and provide that it no longer exists and then to take over those functions.
>
> But the point is that the New Mexico legislature has not done that. . . . The New Mexico legislature granted this very carte blanche authority to [EBID] to administer the project. So [EBID] does administer the project independently, but it is always subject to the ultimate control and responsibility of the legislature.

Hr'g Tr. 25:12-26:5, Aug. 20, 2015. Indeed, a prime example of the oversight and control over EBID by the State of New Mexico is the September 18, 1995, "Joint Powers Agreement" that allows EBID to cooperate with El Paso County Water Improvement District No. 1 to operate facilities in either state to manage portions of the Rio Grande Project.[68] To be effective, the State of New Mexico was required to approve and sign the contract. *See* Hr'g Tr. 55:23-56:2; 56:13-22, Aug. 20, 2015.

As a "New Mexico quasi-municipal corporation," EBID Mot. to Intervene, at 2, its interests are imputed

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[68] Days after oral argument, on August 31, 2015, EBID moved the Special Master for leave to file into the record the Declaration of Gehrig ("Gary") Lee Esslinger, which attached and authenticated an agreement dated September 18, 1995, between EBID and El Paso Water Improvement District No. 1, to which the parties referred in oral argument as the "6A-6B" agreement or the "Joint Powers Agreement." [SM Dkt. 35]. I granted leave to file that exhibit into the record on September 4, 2015. *See* Case Mgmt. Order No. 6 [SM R. Doc. 36].

to be those of New Mexico. Misunderstanding the subject of the dispute in this case, EBID states that it holds "divergent positions" from those of New Mexico. *See* EBID Mem. in Support, at 25; EBID Reply Br., at 34.[69] That admission, however, reveals EBID's intention to impeach its own State, which is offensive to the notion of sovereign dignity and prohibited by the doctrine of *parens patriae*. *See New Jersey v. New York*, 345 U.S. 369, 373 (1953). As explained by Chief Justice Roberts:

> This basic principle [that the State represents all of its citizens in an original jurisdiction action] applies without regard to whether the State agrees with and will advance the particular interest asserted by a specific private entity. The State must be deemed to represent *all* its citizens, not just those who subscribe to the State's position before this Court. The directive that a State cannot be judicially impeached on matters of policy by its own subjects obviously applies to the case in which a subject disagrees with the position of the State.

South Carolina v. North Carolina, 558 U.S. 256, 280 (2010) (Roberts, C.J., concurring in the judgment in

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[69] The contracts between the United States and the irrigation districts in New Mexico and Texas that are the subject of litigation elsewhere are not at issue here. EBID's responsibility to manage Project deliveries within New Mexico after the United States determines EBID's share of Project water has no effect on how the water is allocated among the States under the 1938 Compact.

part and dissenting in part) (internal quotations and citations omitted).

I find no reason that New Mexico cannot represent EBID's interests in this sovereign dispute; indeed, New Mexico has plainly conveyed that it is able and has the right to represent EBID in this case. *See* Hr'g Tr. 39:16-20, Aug. 19, 2015. And EBID has presented no evidence to rebut the presumption that New Mexico will properly represent EBID's interests here.[70]

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[70] EBID's reliance on *Arizona v. California*, 460 U.S. 605 (1983), for the proposition that "a non-state entity may intervene in an original action even though its interest is represented by a sovereign party in the action" is misplaced. EBID Reply Brief at 9. The intervenors in *Arizona* were sovereign Native American tribes, allowed by the Supreme Court to intervene because "at a minimum" they had met the standards for permissive intervention under Rule 24 of the Federal Rules of Civil Procedure. *See* 460 U.S. at 614-15. Because the sovereign Tribes were "independent qualified members of the modern body politic," the Supreme Court held that the intervention standard for nonstate entities in original jurisdiction actions where their interests were already protected identified by the Supreme Court in *New Jersey v. New York*, 345 U.S. 369 (1953) was not applicable. *Id.* at 615 & n.5. EBID, however, is a non-sovereign intervenor whose home state is already a party; therefore, it is subject not to Rule 24 standards, but to the high standard for intervention in an original jurisdiction set forth in *New Jersey v. New York* and *South Carolina v. North Carolina*; that is, EBID has "the burden of showing some compelling interest in its own right, apart from [its] interest in a class with all other citizens and creatures of the state, which interest is not properly represented *by the state*." *South Carolina v. North Carolina*, 558 U.S. 256, 266 (2010) (emphasis added). Under that standard, the question of whether the United States, as administrator of the Rio Grande Project, can properly represent EBID's interests in this case is irrelevant. There may be no doubt that EBID's interests are perhaps better aligned with El Paso

4. Practical considerations militate against permitting EBID to intervene

As described above, one of the underpinnings forming the basis for the Supreme Court's high standard for intervention by a nonstate entity in an original jurisdiction action is the need for "good judicial administration." *New Jersey v. New York*, 345 U.S. 369, 373 (1953). If EBID, as a creature wholly of the State of New Mexico, is allowed to intervene despite New Mexico's presence in the case, the Supreme Court "could, in effect, be drawn into an intramural dispute over the distribution of water" within New Mexico, and "there would be no practical limitation on the number of citizens . . . who would be entitled to be made parties." *Id.*

Further, the Supreme Court has made clear that "mutual accommodation and agreement should, if possible, be the medium of settlement, instead of invocation of [the Court's] adjudicatory power." *Colorado v. Kansas*, 320 U.S. 383, 392 (1943). That said, the negotiation of a settlement among numerous quasi-sovereign parties to solve complex issues – such as are those pertaining to equitable apportionment of interstate waterways – is difficult at best, as is evidenced

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County Water Improvement District No. 1 than with its home state of New Mexico; however, the standard for intervention identified by the Supreme Court in original actions prohibits a non-sovereign, quasi-municipal entity to intervene specifically to impeach its home state.

by the extended history of the making of the 1938 Compact. The introduction of more parties, particularly those that advance narrower interests that may conflict with the goals of the quasi-sovereign signatory States to the 1938 Compact, may prove fatal to any opportunity for amicable resolution. *See South Carolina v. North Carolina*, 558 U.S. 256, 288 (2010) (Roberts, C.J., concurring in judgment in part and dissenting in part) ("[I]ntervention makes settling a case more difficult, as a private intervenor has the right to object to a settlement agreement between the States, if not the power to block a settlement altogether.").

EBID has stated that its "arguments concerning the issues in this case are different from the arguments of the parties, which would help the Court to better understand the complicated issues raised in the case." EBID Mem. in Support, at 29. Although the ability or willingness to advance different or alternative theories in a case is not a ground for intervention here, EBID is likely best suited to assist the Special Master and the Court in resolving this matter as an *amicus curiae*. "Where he presents no new questions, a third party can contribute usually most effectively and always most expeditiously by a brief amicus curiae and not by intervention." *South Carolina*, 558 U.S. at 288 (Roberts, C.J., concurring in judgment in part and dissenting in part) (quotations and citation omitted).

C. Conclusion

For the reasons discussed above, I recommend that EBID's Motion To Intervene be denied. EBID has not met the standard for intervention set forth by the Supreme Court in *South Carolina v. North Carolina*. But intervention is not required to obtain the benefit of EBID's perspective; indeed, I will continue to exercise my procedural authority in this case to ensure the full and fair exposition of the factual and legal issues by encouraging EBID's involvement in this case as *amicus curiae*. *See* Supreme Court Rule 37.1.

VII. El Paso County Water Improvement District No. 1's Motion To Intervene

On April 22, 2015, El Paso County Water Improvement District No. 1 ("EP No. 1") also filed a motion for leave to intervene, attaching a proposed Complaint in Intervention seeking declaratory and injunctive relief that "adopts and incorporates . . . by reference the Complaint in Intervention of the United States." EP No. 1 Compl. in Intervention, at 1. EP No. 1 is "a political subdivision of the State of Texas, created pursuant to the Texas Constitution," and "a general law water improvement district subject to Chapter 55 of the Texas Water Code Annotated, performing governmental functions and standing on the same footing as counties and other political subdivisions." EP No. 1 Mem. in Support, at 1-2. "As a beneficiary of the Rio Grande Project, EP No. 1 is a party to the contracts with the United States and EBID for delivery of water from the

Project, including the 2008 Operating Agreement which allocates water as between Project users in New Mexico and Texas." *Id.* at 11. Those contracts allow EP No. 1 to effect Rio Grande Project deliveries within Texas on behalf of Reclamation after that agency determines EP No. 1's share of water pursuant to Reclamation's administration of the Project. "In addition to the water it supplies for irrigation, EP No. 1 furnishes a significant portion of the annual water supply of the City of El Paso." *Id.* at 3. Further, EP No. 1 contends, "[a]s a distributor of Project water, [it] owns, maintains, and operates irrigation infrastructure which crosses and re-crosses the state line to ensure delivery to both New Mexico and Texas users." *Id.* at 12.

But like EBID, EP No. 1 is not a party to the 1938 Compact. Texas seeks no relief directly against EP No. 1 and it is not specifically mentioned in Texas's Complaint, other than the identification of EP NO. 1 as "a political subdivision of the State of Texas [and] the Rio Grande Project beneficiary of water from the Rio Grande Project for delivery and use in Texas." Compl. ¶ 8. Similarly, the United States seeks no relief directly against EP No. 1, and identifies EP No. 1 only as a contractual recipient of Rio Grande Project water. *See* Compl. in Intervention, ¶ 8.

EP No. 1 seeks leave to intervene as a party in this case, despite the fact that its home state of Texas is already a party. EP No. 1 asserts that it has a unique and compelling interest in this case, one that is distinct from other Texas citizens, and one that is not adequately represented by other parties in the case:

> As a beneficiary of the Rio Grande Project, [EP No. 1] has interests in interstate Project water storage and delivery, infrastructure in both New Mexico and Texas, and contracts providing for the allocation of water supply from the Project. [EP No. 1] thus has a unique and compelling interest in this Court's resolution of the interstate dispute regarding the waters of the Rio Grande. No other water user in Texas can claim the kind of direct stake which [EP No. 1] has in the interpretation and enforcement of the Rio Grande Compact. [EP No. 1]'s interests, however, are not adequately represented by any of the current parties to this case.

EP No. 1 Mot. to Intervene, at 2.

On June 10, 2015, Texas, New Mexico, and the United States filed responses opposing EP No. 1's motion; Colorado filed a limited response, refraining from either supporting or opposing EP No. 1's motion, but reserving its right to file a response pending the outcome of the Court's decisions regarding New Mexico's motion to dismiss. On July 10, 2015, EP No. 1 submitted a reply brief in support of its motion and addressing the opposing responses. On October 5, 2015, the Supreme Court referred EP No. 1's motion to intervene to me.

Based upon the pleadings filed by the parties, I recommend that the Court deny EP No. 1's motion for leave to intervene.

A. The Applicable Legal Standard for Intervention

The high standard for intervention in an original action by a nonstate entity established by the Supreme Court requires that "[a]n intervenor whose state is already a party should have the burden of showing some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state." *South Carolina v. North Carolina*, 558 U.S. 256, 266 (2010) (quoting *New Jersey v. New York*, 345 U.S. 369, 373 (1953)). That standard is discussed fully in Part VI.A, *supra*.

B. EP No. 1 Has Not Met the Standard for Intervention

1. EP No. 1 fails to satisfy its burden to establish a compelling interest that is unlike the interests of other citizens of the State

Texas, New Mexico, and the United States all oppose EP No. 1's motion to intervene on grounds that EP No. 1 has failed to establish that it has a compelling interest that is not adequately represented by the parties. Texas Opp. at 14-16; New Mexico Opp. at 5-18; United States Opp. at 8-10. These arguments are persuasive. The Complaints filed by the State of Texas and the United States seek: (i) enforcement of the 1938 Compact, which equitably apportioned the waters of the Rio Grande among the three signatory States;

(ii) a determination of the rights and duties of the signatory States under the 1938 Compact; and (iii) a determination of the rights of the United States on behalf of the Rio Grande Project and under the Convention of 1906.

EP No. 1 states that its status as "a beneficiary of the Rio Grande Project" serves as the source of its compelling interest in this case. EP No. 1 Mot. to Intervene, at 2. EP No. 1 claims three bases evidencing its alleged unique compelling interest in this case: (1) its interest in the contracts which effectuate the delivery of water obligated to Texas under the 1938 Compact, *see* EP No. 1 Mem. in Supp., at 15; (2) its bi-state interests in the interstate Rio Grande Project, *see id.* at 17-18; and (3) its own water rights in the Rio Grande, *see id.* at 18-24.

As to EP No. 1's first and third bases evidencing a compelling interest: EP No. 1 is a bookend to EBID in that both are contracted by the United States to deliver water to end users, but those contracts do not grant state law water rights to those water improvement districts. *See* Act of June 17, 1902, ch. 1093, 32 Stat. 390 (codified as amended at 43 U.S.C. § 383) ("Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder. . . ."). Only the United States possesses the right to divert and store water in the Project and determine

how water is allocated between EBID and EP No. 1 under federal reclamation law; indeed, the United States itself acquired its water rights via compliance with New Mexico state law. *Id.* ("[A]nd the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws. . . ."); *see also* discussion *supra* Part III.C.3. The certificate of adjudication by the Texas Commission on Environmental Quality cited by EP No. 1 recognizes that the source of the water that EP No. 1 is entitled to divert and deliver to water users in Texas is Rio Grande Project water impounded and released in New Mexico by the United States, not EP No. 1. *See* EP No. 1 Mem. in Support, App. 4-5, 10.

In equitably apportioning the waters of the Rio Grande among the signatory States, the 1938 Compact utilizes the Rio Grande Project to deliver Texas's (and part of New Mexico's) equitable apportionment of Rio Grande waters; the contracts between the state water improvement districts and the United States for the management of the Project are not at issue here. Rather, this case centers squarely on the interpretation of the 1938 Compact as to the rights and duties of the sovereign signatory States under the Compact. Therefore, the contracts between EP No. 1 and the United States for the management of the Rio Grande Project do not afford EP No. 1 a compelling interest in this case.

As to EP No. 1's second basis justifying its alleged compelling interest in this case, EP No. 1 compares

itself to the intervening nonstate entities in *South Carolina v. North Carolina*, 558 U.S. 256 (2010), and argues that it also has sufficient "bi-state interests" that would allow it to intervene as a result of its right to store and release water in New Mexico, as well as the fact the Project's irrigation infrastructure "criss-crosses" the state line to provide Project water to irrigators in both New Mexico and Texas. *See* EP No. 1 Mem. in Support, at 17-18. But EP No. 1 is not a bistate entity like those permitted to intervene in *South Carolina*.

As with all water improvement districts in Texas, EP No. 1 is organized, funded, and governed solely under the laws of Texas. *See* TEX. WATER CODE ANN. §§ 55.001-.805. EP No. 1 has no authority to divert or deliver water in New Mexico. EP No. 1 has executed agreements with the United States to deliver Rio Grande Project water it receives from the United States to Texas water users; that ability to contract with the United States is based solely upon a grant of authority from the State of Texas. *See* TEX. WATER CODE ANN. § 55.185. It is the United States that owns and operates the Project's primary dams and storage facilities and determines how water is released and allocated between EBID and EP No. 1 pursuant to the Rio Grande Project. EP No. 1 is simply the "distributor of Project water" to end users in Texas. EP No. 1 Mem. in Support, at 11. And although the United States has transferred ownership of appurtenant delivery infrastructure to those entrymen who have perfected their beneficial-use rights for irrigation under section 6 of

the 1902 Reclamation Act, the infrastructure quitclaimed to EP No. 1 is located completely within Texas. *See* United States' Opp., App., at 9a-35a.[71] On those facts, EP No. 1 has demonstrated no "bistate" interest justifying intervention in this case.

EP No. 1's interest in this case, therefore, extends only to Texas's equitable apportionment of the waters of the Rio Grande, but that interest is not unique. I note for the Court the position of Hudspeth County Conservation and Reclamation District No. 1 ("Hudspeth"), another Texas water improvement district. Hudspeth is located downstream of EP No. 1 and "holds rights to divert water from the Rio Grande based on a permit from the State of Texas, and has the right to receive water from the Project based on its Warren Act contract with the United States." Brief of Hudspeth County Conservation and Reclamation District No. 1 as *Amicus Curiae* in Opposition To New Mexico's Motion To Dismiss, at 4. And I also note the position in which the City of El Paso finds itself, that city maintains a contract with EP No. 1 to receive water from the Rio Grande Project when water is available; otherwise, it is forced to pump groundwater to meet its demands. *See* Brief of *Amicus Curiae* City of El Paso, Texas in Support of Plaintiff's Motion for Leave To File Bill of Complaint, at 3. Both entities

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[71] The United States has not and cannot transfer ownership of its reservoirs or its right to divert, store, release, and reuse Rio Grande Project water without Congressional approval. *See* Act of June 17, 1902, ch. 1093, 32 Stat. 388, 389-90 (codified as amended at 43 U.S.C. §§ 372-373, 498).

share an interest with EP No. 1 and all other water users in the State of Texas as to Texas's equitable apportionment of the waters of the Rio Grande, one that Texas has filed suit to protect.

On those facts, I do not find that the special considerations justifying the intervention of nonstate entities in *South Carolina* to be present here to afford the same invitation to EP No. 1.

2. EP No. 1 has not rebutted the presumption that Texas adequately represents EP No. 1's interests in this litigation

Texas, New Mexico, and the United States all oppose EP No. 1's motion to intervene on grounds that Texas adequately represents EP No. 1's interests. Texas Opp. at 17; New Mexico Opp. at 18-23; United States Opp. at 10-15. Again, these arguments are persuasive. Even if EP No. 1 were to demonstrate a compelling interest in this litigation to justify intervention, it must also demonstrate that its "interest is not properly represented by the state." *South Carolina v. North Carolina*, 558 U.S. 256, 266 (2010) (quoting *New Jersey v. New York*, 345 U.S. 369, 373 (1953)). By its own admission, EP No. 1 is "a political subdivision of the State of Texas, created pursuant to the Texas Constitution, TEX. CONST. art. XVI, § 59," and is "a general law water improvement district subject to Chapter 55 of the Texas Water Code Annotated, performing governmental functions and standing on the same footing

as counties and other political subdivisions." EP No. 1 Mem. in Support, at 1-2. Thus, pursuant to the doctrine of *parens patriae* and Supreme Court precedent, Texas, as a proper party in interest to this original jurisdiction case, is presumed to represent properly EP No. 1's interests in these proceedings. *See South Carolina*, 558 U.S. at 267; *Nebraska v. Wyoming*, 515 U.S. 1, 21 (1995); *Wyoming v. Colorado*, 286 U.S. 494, 508-09 (1932). But EP No. 1 has not rebutted the presumption that Texas will adequately represent its interests in this case.

After acknowledging the doctrine of *parens patriae*, EP No. 1 nevertheless contends that its "interests are different from those of the citizens of Texas generally and are not adequately represented by Texas in this case," and alleges that, "[w]hile sharing interests in ensuring New Mexico complies with its Compact obligations, [EP No. 1]'s and Texas'[s] rights and interests are not identical." EP No. 1 Mem. in Support, at 24. But the doctrine of *parens patriae* does not require EP No. 1's interests to be aligned seamlessly with those of its sovereign parent, Texas. Indeed, "[t]he State must be deemed to represent *all* its citizens, not just those who subscribe to the State's position before this Court." *South Carolina*, 558 U.S. at 280 (Roberts, C.J., concurring in the judgment in part and dissenting in part) (internal quotations and citations omitted).

EP No. 1 also claims that Texas is not a "specific beneficiary" of the Rio Grande Project and has no intention to defend the terms of the contracts between EP No. 1 and the United States governing the administration of the Rio Grande Project in Texas. EP No. 1

Mem. in Support, at 24-25. Those contentions only highlight EP No. 1's attempt to advance its private interests regarding those contracts, which are not at issue here.

I find no reason that Texas cannot represent EP No. 1's interests in this sovereign dispute; indeed, the very fact that Texas initiated this action demonstrates its willingness and ability to represent and protect EP No. 1's interests, as well as all of the interests of its sister water improvement districts, with respect to the waters of the Rio Grande. EP No. 1 has presented no evidence to rebut the presumption that Texas will properly represent EP No. 1's interests here.[72]

C. Conclusion

For all of the reasons discussed above concerning EBID's motion to intervene, I find that practical considerations also militate against permitting EP No. 1 to intervene. *See* discussion *supra*, Part VI.B.4. I do not disagree with EP No. 1 that this case certainly qualifies as a "unique and complex interstate dispute." EP No. 1 Mem. in Support, at 12. But because EP No. 1 "presents no new questions," EP No. 1 best serves the parties and the Court in this litigation as an *amicus curiae*. *South Carolina*, 558 U.S. at 288 (Roberts, C.J., concurring in judgment in part and dissenting in part).

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[72] Because the standard for intervention of nonparties in original actions is rooted firmly in the doctrine of *parens patriae*, the question of whether the United States as an intervenor party would be able to represent the interests of EP No. 1 is irrelevant.

I recommend that EP No. 1's motion to intervene be denied. EP No. 1 has not met the standard for intervention set forth by the Supreme Court in *South Carolina v. North Carolina*. Again, intervention is not required to obtain the benefit of the perspectives of both EBID and EP No. 1, and I will continue to exercise my procedural authority in this case to ensure the full and fair exposition of the issues by encouraging participation in this case by *amici curiae*, to the extent that they bring to the attention of the Special Master relevant matters not directly brought to its attention by the parties. *See* Supreme Court Rule 37.1.

A proposed order is attached hereto as **Appendix D**.

Respectfully submitted,

A. GREGORY GRIMSAL
Special Master
201 St. Charles Avenue
Suite 4000
New Orleans, LA 70170
(504) 582-1111

February 9, 2017

APPENDIX A

76TH CONG., 1ST SESS. – CH. 155 – MAY 31, 1939

AN ACT

Giving the consent and approval of Congress to the Rio Grande compact signed at Santa Fe, New Mexico, on March 18, 1938.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the consent and approval of Congress is hereby given to the compact signed by the commissioners for the States of Colorado, New Mexico, and Texas at Santa Fe, New Mexico, on March 18, 1938, and thereafter approved by the legislatures of the States of Colorado, New Mexico, and Texas, which compact reads as follows:

RIO GRANDE COMPACT

The State of Colorado, the State of New Mexico, and the State of Texas, desiring to remove all causes of present and future controversy among these States and between citizens of one of these States and citizens of another State with respect. to the use of the waters of the Rio Grande above Fort Quitman, Texas, and being moved by considerations of interstate comity, and for the purpose of effecting an equitable apportionment of such waters, have resolved to conclude a Compact for the attainment of these purposes, and to that end, through their respective Governors, have named as their respective Commissioners:

For the State of Colorado – M. C. Hinderlider

For the State of New Mexico – Thomas M. McClure.

For the State of Texas – Frank B. Clayton

who, after negotiations participated in by S. O. Harper, appointed by the President as the representative of the. United States of America, have agreed upon the following articles, to-wit:

ARTICLE I.

(a) The State of Colorado, the State of New Mexico, the State of Texas, and the United States of America, are hereinafter designated "Colorado," "New Mexico," "Texas," and the "United States," respectively.

(b) "The Commission" means the agency created by this Compact for the administration thereof.

(c) The term "Rio Grande Basin" means all of the territory drained by the Rio Grande and its tributaries in Colorado, in New Mexico, and in Texas above Fort Quitman, including the Closed Basin in Colorado.

(d) The "Closed Basin" means that part of the Rio Grande Basin in Colorado where the streams drain into the San Luis Lakes and adjacent territory, and do not normally contribute to the flow of the Rio Grande.

(e) The term "tributary" means any stream which naturally contributes to the flow of the Rio Grande.

(f) "Transmountain Diversion" is water imported into the drainage basin of the Rio Grande from any stream system outside of the Rio Grande Basin, exclusive of the Closed Basin.

(g) "Annual Debits" are the amounts by which actual deliveries in any calendar year fall below scheduled deliveries.

(h) "Annual Credits" are the amounts by which actual deliveries in any calendar year exceed scheduled deliveries.

(i) "Accrued Debits" are the amounts by which the sum of all annual debits exceeds the sum of all annual credits over any common period of time.

(j) "Accrued Credits" are the amounts by which the sum of all annual credits exceeds the sum of all annual debits over any common period of time.

(k) "Project Storage" is the combined capacity of Elephant Butte Reservoir and all other reservoirs actually available for the storage of usable water below Elephant Butte and above the first diversion to lands of the Rio Grande Project, but not more than a total of 2,638,860 acre-feet.

(l) "Usable Water" is all water, exclusive of credit water, which is in project storage and which is available for release in accordance with irrigation demands, including deliveries to Mexico.

(m) "Credit Water" is that amount of water in project storage which is equal to the accrued credit of Colorado, or New Mexico, or both.

(n) "Unfilled Capacity" is the difference between the total physical capacity of project storage and the amount of usable water then in storage.

(o) "Actual Release" is the amount of usable water released in any calendar year from the lowest reservoir comprising project storage.

(p) "Actual Spill" is all water which is actually spilled from Elephant Butte Reservoir, or is released therefrom for flood control, in excess of the current demand on project storage and which does not become usable water by storage in another reservoir; provided, that actual spill of usable water cannot occur until all credit water shall have been spilled.

(q) "Hypothetical Spill" is the time in any year at which usable water would have spilled from project storage if 790,000 acre-feet had been released therefrom at rates proportional to the actual release in every year from the starting date to the end of the year in which hypothetical spill occurs; in computing hypothetical spill the initial condition shall be the amount of usable water in project storage at the beginning of the calendar year following the effective date of this Compact, and thereafter the initial condition shall be the amount of usable water in project storage at the beginning of the calendar year following each actual spill.

ARTICLE II.

The Commission shall cause to be maintained and operated a stream gaging station equipped with an automatic water stage recorder at each of the following points, to-wit :

(a) On the Rio Grande near Del Norte above the principal points of diversion to the San Luis Valley;

(b) On the Conejos River near Mogote;

(c) On the Los Pinos River near Ortiz;

(d) On the San Antonio River at Ortiz;

(e) On the Conejos River at its mouths near Los Sauces;

(f) On the Rio Grande near Lobatos;

(g) On the Rio Chama below El Vado Reservoir;

(h) On the Rio Grande at Otowi Bridge near San Ildefonso ;

(i) On the Rio Grande near San Acacia;

(j) On the Rio Grande at San Marcial;

(k) On the Rio Grande below Elephant Butte Reservoir;

(l) On the Rio Grande below Caballo Reservoir.

Similar gaging stations shall be maintained and operated below any other reservoir constructed after 1929, and at such other points as may be necessary for the securing of records required for the carrying out of the Compact; and automatic water stage recorders shall

be maintained and operated on each of the reservoirs mentioned, and on all others constructed after 1929.

Such gaging stations shall be equipped, maintained, and operated by the Commission directly or in cooperation with an appropriate Federal or State agency, and the equipment, method and frequency of measurement at such stations shall be such as to produce reliable records at all times.

ARTICLE III.

The obligation of Colorado to deliver water in the Rio Grande at the Colorado-New Mexico State Line, measured at or near Lobatos, in each calendar year, shall be ten thousand acre feet less than the sum of those quantities set forth in the two following tabulations of relationship, which correspond to the quantities at the upper index stations:

DISCHARGE OF CONEJOS RIVER

Quantities in Thousands of Acre Feet

Conejos Index Supply (1)	Conejos River at Mouths (2)	Conejos Index Supply (1)	Conejos River at Mouths (2)
100	0	450	232
150	20	500	278
200	45	550	326
250	75	600	376
300	109	650	426
350	147	700	476
400	188		

Intermediate quantities shall be computed by proportional parts.

(1) Conejos Index Supply is the natural flow of Conejos River at the U. S. G. S. gaging station near Mogote during the calendar year, plus the natural flow of Los Pinos River at the U. S. G. S. gaging station near Ortiz and the natural flow of San Antonio River at the U. S. G. S. gaging station at Ortiz, both during the months of April to October, inclusive.

(2) Conejos River at Mouths is the combined discharge of branches of this river at the U. S. G. S. gaging stations near Los Sauces during the calendar year.

DISCHARGE OF RIO GRANDE EXCLUSIVE OF CONEJOS RIVER

Quantities in Thousands of Acre Feet

Rio Grande at Del Norte (3)	Rio Grande at Lobatos less Conejos at Mouths (4)	Rio Grande at Del Norte (3)	Rio Grande at Lobatos less Conejos at Mouths (4)
200	60	750	229
250	65	800	257
300	75	850	292
350	86	900	335
400	98	950	380
450	112	1000	430
500	127	1100	540
550	144	1200	640
600	162	1300	740
650	182	1400	840
700	204		

Intermediate quantities shall be computed by proportional parts.

(3) Rio Grande at Del Norte is the recorded flow of the Rio Grande at the U. S. G. S. gaging station near

Del Norte during the calendar year (measured above all principal points of diversion to San Luis Valley) corrected for the operation of reservoirs constructed after 1937.

(4) Rio Grande at Lobatos less Conejos at Mouths is the total flow of the Rio Grande at the U. S. G. S. gaging stations near Lobatos, less the discharge of Conejos River at its Mouths, during the Calendar year.

The application of those schedules shall be subject to the provisions hereinafter set forth and appropriate adjustments shall be made for (a) any change in location of gaging stations; (b) any new or increased depletion of the runoff above inflow index gaging stations; and (c) any transmountain diversions into the drainage basin of the Rio Grande above Lobatos.

In event any works are constructed after 1937 for the purpose of delivering water into the Rio Grande from the Closed Basin, Colorado shall not be credited with the amount of such water delivered, unless the proportion of sodium ions shall be less than forty-five percent of the total positive ions in that water when the total dissolved solids in such water exceeds three hundred fifty parts per million.

ARTICLE IV.

The obligation of New Mexico to deliver water in the Rio Grande at San Marcial, during each calendar year, exclusive of the months of July, August and

September, shall be that quantity set forth in the following tabulation of relationship, which corresponds to the quantity at the upper index station :

DISCHARGE OF RIO GRANDE AT OTOWI BRIDGE AND AT SAN MARCIAL EXCLUSIVE OF JULY, AUGUST AND SEPTEMBER

Quantities in Thousands of Acre Feet

Otowi Index Supply (5)	San Marcia Index Supply (6)	Otowi Index Supply (5)	San Marcia Index Supply (6)
100	0	1300	1042
200	65	1400	1148
300	141	1500	1257
400	219	1600	1370
500	300	1700	1489
600	383	1800	1608
700	469	1900	1730
800	557	2000	1856
900	648	2100	1985
1000	742	2200	2117
1100	839	2300	2253
1200	939		

Intermediate quantities shall be computed by proportional parts.

(5) The Otowi Index Supply is the recorded flow of the Rio Grande at the U. S. G. S. gaging station at Otowi Bridge near San Ildefonso (formerly station near Buckman) during the calendar year, exclusive of the flow during the months of July, August and September, corrected for the operation of reservoirs

constructed after 1929 in the drainage basin of the Rio Grande between Lobatos and Otowi Bridge.

(6) San Marcial Index Supply is the recorded flow of the Rio Grande at the gaging station at San Marcial during the calendar year exclusive of the flow during the months of July, August and September.

The application of this schedule shall be subject to the provisions hereinafter set forth and appropriate adjustments shall be made for (a) any change in location of gaging stations; (b) depletion after 1929 in New Mexico at any time of the year of the natural runoff at Otowi Bridge; (c) depletion of the runoff during July, August and September of tributaries between Otowi Bridge and San Marcial, by works constructed after 1937; and (d) any transmountain diversions into the Rio Grande between Lobatos and San Marcial.

Concurrent records shall be kept of the flow of the Rio Grande at San Marcial, near San Acacia, and of the release from Elephant Butte Reservoir, to the end that the records at these three stations may be correlated.

ARTICLE V.

If at any time it should be the unanimous finding and determination of the Commission that because of changed physical conditions, or for any other reason, reliable records are not obtainable or cannot be obtained, at any of the stream-gaging stations herein referred to, such stations may, with the unanimous approval of the Commission, be abandoned, and with

such approval another station, or other stations, shall be established and new measurements shall be substituted which, in the unanimous opinion of the Commission, will result in substantially the same results, so far as the rights and obligations to deliver water are concerned, as would have existed if such substitution of stations and measurements had not been so made.

ARTICLE VI.

Commencing with the year following the effective date of this Compact, all credits and debits of Colorado and New Mexico shall be computed for each calendar year; provided, that in a year of actual spill no annual credits nor annual debits shall be computed for that year.

In the case of Colorado, no annual debit nor accrued debit shall exceed 100,000 acre feet, except as either or both may be caused by holdover storage of water in reservoirs constructed after 1937 in the drainage basin of the Rio Grande above Lobatos. Within the physical limitations of storage capacity in such reservoirs, Colorado shall retain water in storage at all times to the extent of its accrued debit.

In the case of New Mexico, the accrued debit shall not exceed 200,000 acre feet at any time, except as such debit may be caused by holdover storage of water in reservoirs constructed after 1929 in the drainage basin of the Rio Grande between Lobatos and San Marcial. Within the physical limitations of storage capacity in such reservoirs, New Mexico shall retain water in

storage at all times to the extent of its accrued debit. In computing the magnitude of accrued credits or debits, New Mexico shall not be charged with any greater debit in any one year than the sum of 150,000 acre feet and all gains in the quantity of water in storage in such year.

The Commission by unanimous action may authorize the release from storage of any amount of water which is then being held in storage by reason of accrued debits of Colorado or New Mexico; provided, that such water shall be replaced at the first opportunity thereafter.

In computing the amount of accrued credits and accrued debits of Colorado or New Mexico, any annual credits in excess of 150,000 acre feet shall be taken as equal to that amount.

In any year in which actual spill occurs, the accrued credits of Colorado, or New Mexico, or both, at the beginning of the year shall be reduced in proportion to their respective credits by the amount of such actual spill; provided, that the amount of actual spill shall be deemed to be increased by the aggregate gain in the amount of water in storage, prior to the time of spill, in reservoirs above San Marcial constructed after 1929; provided, further, that if the Commissioners for the States having accrued credits authorize the release of part, or all, of such credits in advance of spill, the amount so released shall be deemed to constitute actual spill.

In any year in which there is actual spill of usable water, or at the time of hypothetical spill thereof, all accrued debits of Colorado, or New Mexico, or both, at the beginning of the year shall be cancelled.

In any year in which the aggregate of accrued debits of Colorado and New Mexico exceeds the minimum unfilled capacity of project storage, such debits shall be reduced proportionally to an aggregate amount equal to such minimum unfilled capacity.

To the extent that accrued credits are impounded in reservoirs between San Marcial and Courchesne, and to the extent that accrued debits are impounded in reservoirs above San Marcial, such credits and debits shall be reduced annually to compensate for evaporation losses in the proportion that such credits or debits bore to the total amount of water m such reservoirs during the year.

ARTICLE VII.

Neither Colorado nor New Mexico shall increase the amount of water in storage in reservoirs constructed after 1929 whenever there is less than 400,000 acre feet of usable water in project storage; provided, that if the actual releases of usable water from the beginning of the calendar year following the effective date of this Compact, or from the beginning of the calendar year following actual spill, have aggregated more than an average of 790,000 acre feet per annum, the time at which such minimum stage is reached shall be adjusted to compensate for the difference between the

total actual release and releases at such average rate; provided, further, that Colorado or New Mexico, or both, may relinquish accrued credits at any time, and Texas may accept such relinquished water, and in such event the state, or states, so relinquishing shall be entitled to store water in the amount of the water so relinquished.

ARTICLE VIII.

During the month of January of any year the Commissioner for Texas may demand of Colorado and New Mexico, and the Commissioner for New Mexico may demand of Colorado, the release of water from storage reservoirs constructed after 1929 to the amount of the accrued debits of Colorado and New Mexico, respectively, and such releases shall be made by each at the greatest rate practicable under the conditions then prevailing, and in proportion to the total debit of each, and in amounts, limited by their accrued debits, sufficient to bring the quantity of usable water in project storage to 600,000 acre-feet by March first and to maintain this quantity in storage until April thirtieth, to the end that a normal release of 790,000 acre feet may be made from project storage in that year.

ARTICLE IX.

Colorado agrees with New Mexico that in event the United States or the State of New Mexico decides to construct the necessary works for diverting the waters of the San Juan River, or any of its tributaries, into

the Rio Grande, Colorado hereby consents to the construction of said works and the diversion of waters from the San Juan River, or the tributaries thereof, into the Rio Grande in New Mexico, provided the present and prospective uses of water in Colorado by other diversions from the San Juan River, or its tributaries, are protected.

ARTICLE X.

In the event water from another drainage basin shall be imported into the Rio Grande Basin by the United States or Colorado or New Mexico, or any of them jointly, the State having the right to the use of such water shall be given proper credit therefor in the application of the schedules.

ARTICLE XI.

New Mexico and Texas agree that upon the effective date of this Compact all controversies between said States relative to the quantity or quality of the water of the Rio Grande are composed and settled; however, nothing herein shall be interpreted to prevent recourse by a signatory state to the Supreme Court of the United States for redress should the character or quality of the water, at the point of delivery, be changed hereafter by one signatory state to the injury of another. Nothing herein shall be construed as an admission by any signatory state that the use of water for irrigation causes increase of salinity for which the user is responsible in law.

ARTICLE XII.

To administer the provisions of this Compact there shall be constituted a Commission composed of one representative from each state, to be known as the Rio Grande Compact Commission. The State Engineer of Colorado shall be ex-officio the Rio Grande Compact Commissioner for Colorado. The State Engineer of New Mexico shall be ex officio the Rio Grande Compact Commissioner for New Mexico. The Rio Grande Compact Commissioner for Texas shall be appointed by the Governor of Texas. The President of the United States shall be requested to designate a representative of United States to sit with such Commission, and such representative of the United States, if so designated by the President, shall act as Chairman of the Commission without vote.

The salaries and personal expenses of the Rio Grande Compact Commissioners for the three States shall be paid by their respective States, and all other expenses incident to the administration of this Compact, not borne by the United States, shall be borne equally by the three States.

In addition to the powers and duties hereinbefore specifically conferred upon such Commission, and the members thereof, the jurisdiction of such Commission shall extend only to the collection, correlation, and presentation of factual data and the maintenance of records having a bearing upon the administration of this Compact, and, by unanimous action, to the making of recommendations to the respective States upon

matters connected with the administration of this Compact. In connection therewith, the Commission may employ such engineering and clerical aid as may be reasonably necessary within the limit of funds provided for that purpose by the respective States. Annual reports compiled for each calendar year shall be made by the Commission and transmitted to the Governors of the signatory States on or before March first following the year covered by the report. The Commission may, by unanimous action, adopt rules and regulations consistent with the provisions of this Compact to govern their proceedings.

The findings of the Commission shall not be conclusive in any court or tribunal which may be called upon to interpret or enforce this Compact.

ARTICLE XIII.

At the expiration of every five-year period after the effective date of this Compact, the Commission may, by unanimous consent, review any provisions hereof which are not substantive in character and which do not affect the basic principles upon which the Compact is founded, and shall meet for the consideration of such questions on the request of any member of the Commission; provided, however, that the provisions hereof shall remain in full force and effect until changed and amended within the intent of the Compact by unanimous action of the Commissioners and until any changes in this Compact are ratified by the legislatures of the respective states and consented to

by the Congress, in the same manner as this Compact is required to be ratified to become effective.

ARTICLE XIV.

The schedules herein contained and the quantities of water herein allocated shall never be increased nor diminished by reason of any increases or diminution in the delivery or loss of water to Mexico.

ARTICLE XV.

The physical and other conditions characteristic of the Rio Grande and peculiar to the territory drained and served thereby, and to the development thereof, have actuated this Compact and none of the signatory states admits that any provisions herein contained establishes any general principle or precedent applicable to other interstate streams.

ARTICLE XVI.

Nothing in this Compact shall be construed as affecting the obligations of the United States of America to Mexico under existing treaties or to the Indian tribes, or as impairing the rights of the Indian tribes.

ARTICLE XVII.

This Compact shall become effective when ratified by the legislatures of each of the signatory States and consented to by the Congress of the United States.

Notice of ratification shall be given by the Governor of each State to the Governors of the other States and to the President of the United States, and the President of the United States is requested to give notice to the Governors of each of the signatory States of the consent of the Congress of the United States.

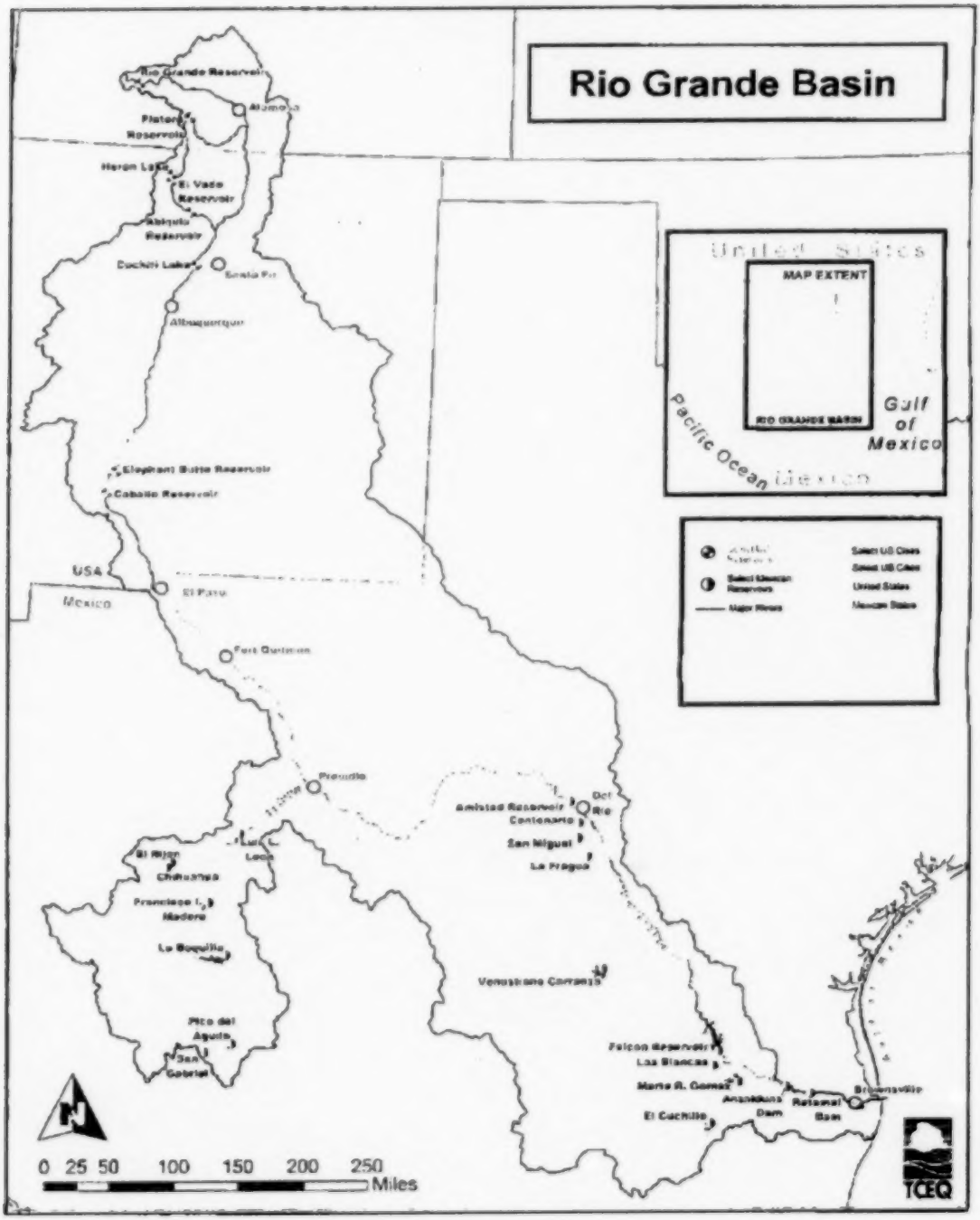
IN WITNESS WHEREOF, the Commissioners have signed this Compact in quadruplicate original, one of which shall be deposited in the archives of the Department of State of the United States of America and shall be deemed the authoritative original, and of which a duly certified copy shall be forwarded to the Governor of each of the signatory States.

Done at the City of Santa Fe, in the State of New Mexico, on the 18th day of March, in the year of our Lord, One Thousand Nine Hundred and Thirty-eight.

M. C. HINDERLIDER.
THOMAS M. MCCLURE.
FRANK B. CLAYTON.

Approved:
S. O. HARPER.
Approved, May 31, 1939.

APPENDIX B


Rio Grande Basin
Rio Grande Reservoir
Alamosa
Platoro Reservoir
Heron Lake
El Vado Reservoir
Abiquiu Reservoir
Cochiti Lake
Santa Fe
Albuquerque
Elephant Butte Reservoir
Caballo Reservoir
USA
Mexico
El Paso
Fort Quitman
Presidio
Ojinaga
Amistad Reservoir
Del Rio
Centenario
San Miguel
La Pryor
El Ribor
Chihuahua
Ojinaga
Francisco I. Madero
La Boquilla
Venustiano Carranza
Pico del Aguila
San Gabriel
Falcon Reservoir
Las Blancas
Maria A. Gomez
Anzalduas Dam
Retamal Dam
El Cuchillo
Brownsville
United States
MAP EXTENT
RIO GRANDE BASIN
Gulf of Mexico
Pacific Ocean
Mexico
Select US Cities
Select US Cities
Select Mexican Reservoirs
United States
Major Rivers
Mexican States
0 25 50 100 150 200 250
Miles
TCEQ

APPENDIX C

Figure 1

APPENDIX D

PROPOSED ORDER

STATE OF TEXAS v. STATE OF NEW MEXICO AND STATE OF COLORADO

No. 141, Original

_____, 2017

ORDER

Having considered the briefs of the parties and amici curiae in support of, opposition to, or otherwise relating to the Motion to Dismiss filed in this action by the State of New Mexico (dated April 30, 2014), as against the State of Texas' Complaint and the United States' Complaint in Intervention;

Having also considered the briefs of the parties and amici curiae in support of, opposition to, or otherwise relating to the Motion to Intervene filed in this action by Elephant Butte Irrigation District (dated December 3, 2014), and the Motion to Intervene filed in this action by El Paso County Water Improvement District No. 1 (dated April 22, 2015),

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

1. The State of New Mexico's Motion to Dismiss the Complaint of the State of Texas is DENIED.

2. The State of New Mexico's Motion to Dismiss the Complaint in Intervention of the United States is GRANTED IN PART to the extent

that the United States cannot state a claim under the 1938 Rio Grande Compact; but said Motion is DENIED to the extent that the United States has stated a claim under federal reclamation law, as to which the Court exercises its original but not exclusive jurisdiction under 28 U.S.C. §1251(b)(2).

3. Elephant Butte Irrigation District's Motion to Intervene is DENIED.

4. El Paso County Water Improvement District No. 1's Motion to Intervene is DENIED.

NO. 141, ORIGINAL.
In the
Supreme Court of the United States
STATE OF TEXAS,
Plaintiff,

v.

STATE OF NEW MEXICO
and STATE OF COLORADO,
Defendants.

FIRST INTERIM REPORT OF THE SPECIAL MASTER
DVD Doc. 1 – DVD Doc. 27